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Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 57

FAWCETT PUBLICATIONS, INC., *Appellant*,

v.

DENNIT MORRIS, *Appellee*.

Appeal from the Supreme Court of Oklahoma

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The majority and dissenting opinions of the Oklahoma Supreme Court are not yet reported but are printed herein in Appendix "B" (pp. 5a-30a; R. 291-335). The order and memorandum opinion of the trial court overruling appellant's special jurisdictional plea are unreported, but are printed herein in Appendix "D" (pp. 32a-36a; R. 51-54).

JURISDICTION

Appellant hereby appeals from a final judgment of the Supreme Court of Oklahoma which affirmed a trial court judgment against appellant in a civil libel action. The judgment of the Supreme Court of Oklahoma was entered on July 17, 1962, and a petition for rehearing was denied by that Court on October 16, 1962. Notice of Appeal was filed in the Supreme Court of Oklahoma on November 14, 1962.

The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by 28 U.S.C. § 1257(2). The following cases sustain the jurisdiction of this Court to review the judgment on appeal in this case: *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313 (1950); *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673 (1930); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Saunders* v. *Shaw*, 244 U.S. 317 (1917).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The text of Title 18, § 1.17, Oklahoma Statutes (Laws of 1947; O. S. 1961), Title 18, § 472, Oklahoma Statutes (Laws of 1929; O. S. 1961), and the pertinent federal constitutional provisions are set forth in Appendix "A" (pp. 1a-4a).

QUESTIONS PRESENTED

1. Whether Fourteenth Amendment due process is violated by Sections 1.17 and 472 of 18 Oklahoma Statutes, as construed and applied in this case to subject an out-of-state publisher to jurisdiction in Oklahoma by substituted service in a libel suit, where the publisher sold and shipped publications from outside the State to independent wholesale distributors within, and had one traveling "good-will" representative for the tri-state area of Arkansas,

Oklahoma, and Texas who observed sales of the publications but engaged in no solicitation, newsgathering, collection, or similar activities.

2. Whether the federal constitutional guarantee of freedom of the press is abridged by (a) subjecting the above-described publisher to a libel suit in Oklahoma pursuant to the aforesaid Oklahoma statutes, and (b) by adjudging the publisher guilty of libeling the plaintiff as a matter of law although the publication does not name, identify or refer to the plaintiff.

3. Whether the Oklahoma courts' action in adjudging appellant guilty of libel as a matter of law, which left for the jury only the question of amount of damages, deprived appellant of its right to a fair trial and a trial by jury, in violation of the due process and equal protection clauses of the Fourteenth Amendment.

4. Whether the trial court's action in supervising and permitting television, movie, and press photographers to occupy the courtroom and take pictures of the jury, judge, and other participants in the trial for publication prior to the retirement of the jury deprived appellant of a fair trial, in violation of the due process clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

a. Preliminary Statement

Appellee, an ex-Oklahoma University alternate fullback, sued appellant for libel in an Oklahoma court on the basis of a brief paragraph in an extended article concerning the widespread dispensation of "pep pills" to athletes, which appeared in True Magazine. The paragraph alluded to "players" on the Oklahoma team—which varied from 60 to 70 persons—but did not name or identify which individuals were concerned. In lieu of personal service in the State, process was served on the Secretary of State

pursuant to the Oklahoma "long arm" statute. The trial court overruled appellant's special plea to jurisdiction of the person, adjudged appellant guilty of libeling appellee *as a matter of law*, left to the jury only the question of damages, and accepted the jury's award to appellee of $75,000. Although the judgment was clearly against the applicable precedents, the Oklahoma Supreme Court spun abruptly away from them, and affirmed. This is the first of a series of separate libel suits filed against appellant in Oklahoma on the basis of the aforesaid paragraph.[1]

On the personal jurisdiction question as well as on the merits, the decision below constitutes a flagrant and virtually unparalleled arrogation of power by a state court.[2] The decision is in direct conflict with a number of federal circuit and state court cases refusing to uphold "long arm" service on a nonresident publisher having the same *de minimis* contacts with the forum state as appellant in the instant case. This conflict requires prompt resolution by this Court.

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[1] At the present time, twelve other libel complaints based on the allegedly libelous paragraph in True Magazine are now pending in the U.S. District Court for the Western District of Oklahoma, having been removed to that court from the State trial court on the ground of diversity of citizenship. (Civil Docket Nos. 9798-9809, inclusive.)

In the instant case, the original complaint named as a co-defendant the Mid-Continent News Company of Oklahoma City, Oklahoma, an independent magazine wholesaling firm which buys appellant's magazines and sells them to retail outlets in Oklahoma. The case was removed to the U.S. District Court for the Western District of Oklahoma, but was remanded to the State trial court (R. 40), apparently because of a belief that the requisite diversity of citizenship was lacking. At the conclusion of the trial, the trial court promptly awarded Mid-Continent a directed verdict. (R. 207).

[2] Cf. *New York Times Co.* v. *Sullivan*, 144 So. 2d 25 (Alabama, 1962), *cert. granted*, January 7, 1963 (No. 606, this Term).

Moreover, this case presents critical questions of freedom of the press and due process rights to a fair trial and trial by jury. If states may acquire *in personam* jurisdiction by "long arm" service of foreign publishers, deprive them of a jury trial, adjudge them guilty of libel as a matter of law, and order them to pay vast sums in "presumed damages" on the basis of publications which may irritate the feelings of local partisans but which do not name, identify, or cause actual harm to any person, then it is apparent that an easy method has been devised for putting any publisher—large or small—quickly out of business.

Finally, the case presents an important question concerning the propriety and fairness, as a matter of due process, of allowing television, movie, and press photographers to take pictures in the courtroom for public exhibition prior to the retirement of the jury.

b. Appellant's Contacts with the State of Oklahoma

Appellant, a Delaware corporation having its principal corporate and executive offices in Greenwich, Connecticut, and New York City, is engaged in the publishing of numerous books and magazines, including True Magazine. (R. 17, 19.) Appellant's publications are sold to independent wholesale distributors throughout the nation, who in turn sell them to retail outlets. (R. 18, 19.)

Appellant has no office or other place of business in Oklahoma. It owns no property there, has no local telephone number or other directory listing, is not qualified or admitted to do business in the State, and has not appointed a resident agent there for service of process. (R. 17, 18, 52A, 108.) Appellant sells and ships its books and magazines from outside the State of Oklahoma to several independent wholesale firms within the State, and these wholesalers resell the publications entirely on their own account to various retail outlets. (R. 18, 19, 97, 103.) Appellant has no stock ownership or other interest in these

wholesalers, and the relationship between appellant and the wholesalers is strictly arms-length and defined by written contract. The contract between appellant and Mid-Continent News Company of Oklahoma City, which is typical of all its contracts, is set forth in Appendix "E." (Pp. 37a-43a, *infra*; R. 273-75).

The contract expressly provides that the wholesaler shall act as an independent contractor, and as such, shall have no authority to make any contracts or agreements for appellant or to make any expenditures on its behalf. (P. 40a, *infra*; R. 274.) The contract is non-exclusive, *i.e.*, the wholesaler is free to purchase and distribute the publications of other publishers, and the contract does not entitle the wholesaler to exclusive territorial rights in the sale of appellant's publications. (*Ibid.*) Mid-Continent News Company, for example, purchases and distributes the publications of about *18 different publishers.* (R. 93.)

Under the contract, appellant sells and ships magazines and books to the wholesaler and bills the wholesaler therefor at prices fixed by appellant. (P. 37a-38a, *infra*; R. 273.) The wholesaler agrees not to release the publications to its retail customers until certain release dates designated on monthly notices issued by appellant. (P. 39a, *infra*; R. 273.) The wholesaler is billed as of the first of each month for all publications received from appellant and must make full payment by the fifteenth of the month, with no deductions whatever. (*Ibid.*) The wholesaler agrees to keep its retailers adequately supplied with appellant's publications, to furnish retailers with dealers' helps and other advertising materials supplied by appellant, to take periodic inventories of the retailers' stock, and to make reports to appellant identifying the retailers and giving routine sales information about them. (P. 39a-40a, *infra*; R. 274.)

The wholesaler is entitled to credit for any of appellant's publications which remain unsold after a specified "off-

sale" date. Credit is obtained, in the amount at which the material was originally billed to the wholesaler, by returning to appellant the covers or portions of covers of unsold magazines, or in the case of books and certain other publications, by returning the whole books. (P. 41a, *infra;* R. 274.)

The wholesaler agrees to permit appellant to increase or decrease orders of publications shipped to the wholesaler as sales justify. (P. 40a, *infra*; R. 274.) The contract is for ten years, but is cancellable by *either party* at any time, with or without cause, by giving ten days written notice to the other party. (P. 42a, *infra*; R. 275.)

Appellant employs one traveling representative named Richard L. Mead who travels in Arkansas, Oklahoma, and Texas. (R. 18, 95, 102.) He acts solely as a "goodwill ambassador" for appellant and does not exercise any supervision or control over any of the companies that purchase magazines and books from appellant. (R. 18, 110, 114.) He is not authorized to take orders for appellant's publications, to make contracts or agreements on appellant's behalf, or to make any purchases or sales. (R. 18, 110.) His job is to travel throughout his tri-state territory, to observe the display, promotion, and single copy distribution of appellant's books and magazines, and to make reports of his observations to his superiors in Greenwich, Connecticut.[3] (R. 24, 98, 103.) He may make suggestions to wholesalers or retailers concerning ways to improve the displays of

[3] Mr. Mead testified as to the nature of his employment as follows: "Well, I would say mostly that it's a public relations job. What we do, we have wholesalers, as you know, all over the country that distribute our magazines, and they have an agreement with our company to do certain things, such as the putting out of our magazines on certain dates and displaying them in certain ways in the retail outlets, drugstores, supermarkets and so forth, and it is just my job to go around and see that they are fulfilling their agreement with our company." (R. 97.)

magazines, but he can take no action except to make reports to the Greenwich office. (R. 101, 103.) His home is in Tulsa, Oklahoma, but this is entirely by his own choice and he could as well live in one of the other two states in his territory. (R. 109, 114.)

Appellant has no writers, reporters, advertising solicitors, collectors, circulation agents, or other such representatives in the State.

c. The Allegedly Libelous Publication

The March, 1958, issue of True Magazine carried a lengthy article entitled, "The Pill That Can Kill Sports," by Neal Wilkinson. The full article, as it appeared in the magazine, is reproduced in Appendix "G." (Pp. 47a-51a, *infra*; R. 263-70.) The article concerns the practice of administering amphetamine, which is a stimulant affecting the heart and nervous system, to athletes in many amateur and professional sports to improve their playing performance. The practice of giving amphetamine to amateur athletes is described as an undesirable one that is growing more widespread; and the theme of the article from beginning to end is that the blame rests squarely upon school or team officials, coaches, and physicians who are alone responsible for the practice.

Thus, the article is headed with the caption that "You can go to jail for selling amphetamine to a truck driver or injecting it into a racehorse, yet this same drug is being handed out to high school and college athletes all over the country." The article begins with a well-known incident in which a high school basketball coach gave amphetamine to some of his players, one of whom later suffered a nervous breakdown. When queried about the incident, the coach readily admitted giving the drug to some of his players, and added that "It's common coaching practice." He had been furnished with the amphetamine by a doctor who was a

county health commissioner and who defended athletic use of the drug. (P. 48a, *infra*; R. 266.)

The article proceeds to describe the potentially injurious effects of amphetamine upon athletes to whom it is administered. Numerous instances in which amphetamine has been given to athletes by coaches or other team officials are cited. Several nationally known figures in the fields of medicine, athletics, and government are quoted as having acknowledged and deplored the growing practice of administering amphetamine to athletes, whether they be professional or amateur. The article concludes as it began—by emphasizing so as to leave no doubt in the reader's mind that the full blame and responsibility for the dispensation of amphetamine to athletes must rest upon those school or team officials who engage and acquiesce in the practice.

It was in this context that the alleged libel appeared. This brief paragraph, which is located about three-fourths of the way through the article (p. 50a, *infra*; R. 268), reads as follows:

> "Speaking of football teams, during the 1956 season, while Oklahoma was increasing its sensational victory streak, several physicians observed Oklahoma players being sprayed in the nostrils with an atomizer. And during a televised game, a close-up showed Oklahoma spray jobs to the nation. 'Ten years ago,' Dr. Howe observed acidly, 'when that was done to a horse, the case went to court. Medically, there is no reason for such treatment. If players need therapy, they shouldn't be on the field.'"

The article contains no other reference to the Oklahoma football team and it nowhere names or identifies any Oklahoma player.

d. Proceedings in the Trial Court

Appellee, who was an alternate fullback on the 1956 University of Oklahoma football team, filed this libel suit in the District (State) Court of Oklahoma County, Oklahoma, in January, 1959. Named as co-defendants were appellant and the Mid-Continent News Company of Oklahoma City, one of the several wholly independent magazine and book wholesaling companies which buy publications from appellant and sell them to retailers in Oklahoma.[4] The complaint alleged that the above-quoted paragraph in the magazine article charged the use of amphetamine by the Oklahoma University football team, and that this charge was untrue and damaging to the reputation of appellee and imputed to him "the commission of a crime against the laws of the State of Oklahoma, and is, therefore, libelous per se . . . ."

Appellant was not personally served with process in the State of Oklahoma. In lieu of such service, summons was served upon the Oklahoma Secretary of State pursuant to Sections 1.17 and 472 of Title 18, Oklahoma Statutes. (Pp. 2a-4a, *infra*; R. 10-11.) In substance, these sections provide that in a suit against a foreign corporation which does business in Oklahoma without having appointed a resident agent in the State for service of process, process may be served upon the Secretary of State in order to acquire *in personam* jurisdiction of the foreign corporation.

Appellant entered a special appearance solely for the purpose of challenging the court's jurisdiction over the person of appellant in light of its non-presence in, and lack of sufficient contacts with, the State of Oklahoma. Appellant moved to quash the purported service of summons on grounds that it was a foreign corporation not domesticated or doing business in Oklahoma and having no office, property, officers, or agents in the State. (R. 12-13.)

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[4] See note 1, *supra*.

The trial court received affidavits and testimony concerning the matters raised in the jurisdictional plea. (R. 15a-25, 81-114.) The facts thus adduced have been summarized in part b, *supra*. After briefing and oral argument, the trial court issued an order and memorandum opinion overruling the jurisdictional plea. (Appendix "D," pp. 32a-36a, *infra;* R. 51-53.)

Citing and relying upon *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957), and other federal cases (pp. 34a-35a, *infra;* R. 52B-52D), the court ruled that appellant was "doing business" in Oklahoma, and hence was amenable to suit there, in view of its contract with Mid-Continent News Company and the occasional presence in the State of appellant's traveling representative, Mead. On the sole basis of these two contacts with the State, the court conceived the fiction that appellant had created a "branch office" in Oklahoma. (P. 34a, *infra;* R. 52B.)

At the trial, it was adduced through testimony of the coach and the trainer of the Oklahoma University football team that a physician was present and in charge of all medical treatment and medication given to Oklahoma players during all games, and that "everything we do is under the supervision of the doctors." (R. 137, 126-27, 145-46.) Appellee's own evidence thus negated any possibility that administration or use of amphetamine could have been considered a crime, since under Oklahoma law amphetamine may be legally given or prescribed by a physician. 63 Okla. Statutes § 469. It was also brought out that some of the Oklahoma football players were sprayed in the mouth during games with an atomizer said to contain spirits of peppermint, which was for the purpose of relieving mouth dryness or "cottonmouth." (R. 148-49, 192-93.) It was denied that amphetamine or any other such drug was given to any player for the purpose of "pepping him up" or improving his performance. (R. 133, 151.)

The coach, Charles Wilkinson, testified that his reaction to the magazine article was that it was not a "serious accusation" (R. 140), that it was "semi-sensational journalism which people in athletics become used to"[5] (R. 134), and that this was "unavoidable" because of the "extreme interest in our athletic teams" (R. 140, 134). The trainer, Kenneth Rawlinson, stated that he felt as though the article was directed at him, as team trainer, and at the other University officials, such as the coach and physicians. (R. 155.)

Appellee testified that he missed two of Oklahoma University's eleven football games during the 1956 season due to a leg injury. (R. 189.) Of the total of eleven games, two were nationally televised. (R. 136.) It was not established whether appellee played in both of the nationally televised games. The membership of the Oklahoma University football team, according to Coach Wilkinson, ranged "in the general area of 60, 65 to 70 boys" and there were some who dropped out. (R. 128.)

There was no evidence whatever that anyone understood or interpreted the allegedly libelous paragraph as referring to appellee, much less that anyone gained the impression that the paragraph maligned or accused appellee or any other player of committing a crime. Appellee's only evidence in this regard consisted of his testimony that there had been publicity about the article (R. 192), and that people had talked to him about it. (R. 195-96.)[5] There was no testimony that appellee's reputation was in any way harmed by the magazine article. He played professional football for one season and part of another after leaving the University of Oklahoma (R. 194), after which he secured his present position in the sales department of the Phillips

[5] Specifically, appellee testified that "the general conversations had to do with my part of the University of Oklahoma, and then they would ask me about these other instances, and I would tell them I didn't know about it." (R. 196.)

Petroleum Company. (R. 194-95.) He considers his "reputation as good as any man in athletics," and continuously speaks at banquets and works with youth organizations and church groups. (R. 198.)

At the conclusion of the evidence, the trial court directed a verdict on the merits in favor of appellee and against appellant, which left as the sole matter for jury determination the amount of damages to be awarded. (R. 209.) The court also directed a verdict totally absolving defendant Mid-Continent News Company, appellant's so-called "branch office," instructing the jury that Mid-Continent was "no longer a party to this action." (R. 209.) The jury returned a verdict against appellant in the amount of $75,000.00 "actual damages" (R. 217), and the trial court entered judgment thereon (Appendix "F," pp. 44a-46a, *infra;* R. 232-35).

e. Facts Concerning News Photographers in the Courtroom

During the course of the trial, motion picture, television, and other news cameramen brought their equipment into the courtroom to take pictures. This was done with the permission and supervision of the trial judge. After all the participants in the trial had taken their places to proceed with the trial, the judge announced that the court was "in recess" solely for the purpose of allowing the news photographers to take pictures. The photographers were then allowed to take such pictures as they desired of the jury, judge, attorneys, parties, witnesses, and spectators. The pictures thus taken were widely published and shown on television in the area on June 13 and 14, 1960, during times when the jury was in recess and before they had retired to deliberate; and the jurors therefore had full opportunity to see the pictures and hear the accompanying news commentary prior to their decision.

The facts in connection with the taking and publication of these pictures are set forth in an affidavit of one of ap-

pellant's trial attorneys who was present throughout the trial. (R. 228-31.) Counsel were not forewarned that a "recess" would be called for the purpose of permitting news photographers to take pictures. After calling the "recess," and thus preventing the ensuing events from being reflected in the court reporter's notes and transcript, the trial judge asked—in the presence of the jury and the news photographers—if there was "any objection" to permitting the pictures to be taken. (R. 228-29.) This procedure put defense counsel at a double disadvantage. Not only would an objection have been obviously unavailing and useless since it would go unrecorded, but it would also have been voiced in front of the jury and newsmen, thus placing appellant in a bad light and exacerbating an already precarious situation. (R. 229-30.)

All of this was brought to the attention of the trial court and made a matter of record in appellant's motion for new trial, which asserted that allowance of the courtroom photography and the consequent public dissemination of the pictures had prevented appellant from having a fair trial. (R. 227.) Defense counsel's affidavit detailing the above facts was attached to the motion. (R. 228-31.) These facts have never been controverted. In denying the motion for new trial, the trial court ruled on the question as follows: "Now the matter of T. V. in the Courtroom. Now the same was done while Court was not in session and I think the record so shows." (R. 242.)

f. Decision of the Oklahoma Supreme Court

On appeal, the Supreme Court of Oklahoma affirmed the judgment of the trial court by a closely divided vote. Five Justices joined in the majority opinion of affirmance (Appendix "B," pp. 5a-27a, *infra;* R. 291-329), three Justices concurred in part and dissented in part, without opinion (p. 27a, *infra;* R. 329), and one Justice dissented, with opinion (pp. 28a-30a, *infra;* R. 332-35).

The majority opinion first addressed itself to the question of the trial court's jurisdiction over the person of appellant, which was properly raised and fully preserved by appellant's special pre-trial jurisdictional plea and motion to quash service. The court construed Sections 1.17 and 472 of Title 18, Oklahoma Statutes (1961), as authorizing substituted service on the Secretary of State to acquire *in personam* jurisdiction over appellant because, in the court's view, appellant was "doing business" in the State within the meaning of that phrase as used in the statute. In so holding, the court relied solely upon the contract between appellant and the independent wholesale distributor, Mid-Continent News Company, and the activities of appellant's representative Mead, who traveled the three states of Oklahoma, Arkansas, and Texas. "Considering the terms of the contract," stated the court, "and the activities of Fawcett's 'traveling representative,' we are forced to the conclusion that for all practical purposes Mid-Continent was little more than *a mere conduit* through which Fawcett exercised its own free and unhampered discretion as to all pertinent details of the business." (P. 9a, *infra;* R. 299.) (Emphasis added.)

On the merits, the court sustained the trial court's adjudication that appellant was guilty of libeling appellee as a matter of law, although it could cite no prior decision from Oklahoma or elsewhere which did not afford the defendant at least the right of a jury trial on whether the plaintiff was in fact defamed by a publication referring to a relatively large group or class of persons but not naming or identifying the plaintiff. The court spent many pages in trying to reconcile what it termed a "superficial lack of harmony in the decisions from this court on what constitutes libel per se . . ." (p. 14a, *infra*; R. 308), and several more pages in explaining why it was now departing from the "substantial precedent from other jurisdictions to the effect that a member of a 'large group' may not recover in an individual action for a libelous publication unless he is referred to personally. . . ." (p. 21a, *infra;*

R. 320-21.) But in the end the court simply swept under the rug appellant's jury trial contentions, as well as the fact that no evidence whatever had been adduced that anyone understood the paragraph in the magazine article as either referring to appellee or accusing him or any other player of committing a crime.

Regarding appellant's claim of deprivation of a fair trial because of the presence of movie, television, and press photographers in the courtroom and the resulting publication of pictures, the Oklahoma Supreme Court observed that "the record of the trial proper" did not show that photography occurred during the progress of the actual trial. Rather, as shown in the affidavit of defense counsel which was attached to the motion for new trial, it appeared that the photography occurred during "recess." The court accepted the showing made in the affidavit and passed upon the question, stating, "*On this showing*, we are unable to say that defendant was deprived of a fair trial." (P. 24a, *infra;* R. 325.) (Emphasis added.)

g. The Federal Questions Were Timely Raised in the Proceedings Below

(1) The question of the constitutionality, under the due process clause of the Fourteenth Amendment, of the Oklahoma "long arm" statute as applied to appellant herein was adequately raised in appellant's special pre-trial jurisdictional plea and motion to quash the substituted service on grounds that the necessary contacts to support such service were lacking. (R. 12-13.)[6] Clear substantiation of this is supplied by the trial court's order and memorandum opinion which held substituted service under the

[6] This is the permissible method of initially challenging jurisdiction of a defendant's person under Oklahoma procedure, and it does not constitute waiver or submission either to file such a plea or to defend on the merits if the plea is overruled. See *First State Bank of Tuskahoma* v. *J. B. Klein Iron & Foundry Co.*, 180 Okla. 42, 68 P. 2d 777 (1937); *Southard* v. *Oil Equipment Corp.*, 296 P. 2d 780 (Okla., 1956).

Oklahoma statute to be valid on authority of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957), and other federal decisions involving the due process validity of state statutes authorizing substituted service on non-resident defendants. (Pp. 34a-35a, *infra;* R. 52B-52C.) As the trial court noted, prior Oklahoma cases "follow" *International Shoe*, *supra*, which "broadened" the "basic principles having to do with this question." (P. 34a, *infra;* R. 52B.)

Thus, in *S. Howes Co.* v. *W. P. Milling Co.*, 277 P. 2d 655 (1954), the Oklahoma Supreme Court relied squarely upon *International Shoe*,[7] *supra*, and *Marlow* v. *Hinman Milking Mach. Co.*, 7 F.R.D. 751 (D.C. Minn., 1947), in deciding the meaning of "doing business" under Sections 1.17 and 472 of Title 18, Oklahoma Statutes. (277 P. 2d at 657-58.) Citation of the *Marlow* case is of substantive significance since the opinion in that case explicitly equated "doing business" with *International Shoe's* Fourteenth Amendment due process formulization of that term when employed in the context of substituted service of process on non-resident defendants.[8] In the following substituted service cases also, the Oklahoma Supreme Court looked squarely to this Court's precedents in construing the statutory meaning of "doing business": *Kaw Boiler Works* v. *Frymer*, 100 Okla. 81, 227 Pac. 453 (1924); *Title Guaranty & Surety Co.* v. *Slinker*, 42 Okla. 811, 143 Pac. 41 (1914). And see the like decision of the Tenth Circuit in *Abel* v.

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[7] *International Shoe* held: "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945).

[8] In *Marlow*, the court stated: "However, the Supreme Court of the United States has enunciated and applied certain rules which are controlling in determining what facts are important and if the facts sufficiently establish that the company is 'doing business' within the state. *International Shoe Co.* v. *State of Washington* ... ." 7 F. R. D. at 753.

Albina Engine & Machine Works, 284 F. 2d 510 (1960) (construing the Okla. Statute here involved). It is thus beyond doubt that the Oklahoma Supreme Court had construed the term "doing business" in Sections 1.17 and 472 to be co-extensive and synonymous with the Fourteenth Amendment due process definition of that term as delineated in *International Shoe* and other federal cases.

In the light of this construction by the highest court of the State of Oklahoma, it is manifest that a subsequent pre-trial objection, such as that made by appellant in this case, to a substituted service of process on the ground that defendant is not "doing business" in Oklahoma within the statutory meaning *a fortiori* invokes the due process clause of the Fourteenth Amendment.[9]

The contrary statement in the majority opinion of the court below, that "No question of due process under the Fourteenth Amendment of the United States Constitution is presented" (p. 8a, *infra;* R. 297), can only be viewed as an expedient and *ad hoc* contrivance improvised in an attempt to insulate the case from review by this Court. In its very next paragraph, the majority opinion exposes itself by approvingly citing the case of "*S. Howes Co.* v. *W. P. Milling Co.*, Okl. 277 P. 2d 655 at page 657" which, as shown above, used *International Shoe* and kindred federal cases to take the measure of what constitutes "doing business" under Sections 1.17 and 472.[10] Equally betraying is the next citation in the majority opinion, immediately following that of the *S. Howes Co.* case, *i.e.*, "20 C.J.S. Corporations, Section 1920 at page 151." The page referred to in Corpus Juris Secundum cites no less than

[9] Both appellant and appellee cited and argued federal due process cases on the "doing business" question before the Oklahoma Supreme Court. Brief of Plaintiff in Error 23-24; Brief of Defendant in Error 25-27; Reply to Answer Brief 2-8.

[10] It should be noted that the majority opinion referred to the *very page* of the *S. Howes Co.* opinion (657) at which *International Shoe* was relied upon.

twelve federal cases. The last sentence of the text on page 151, which is continued on page 152, states:

> "The question whether a foreign corporation is doing business in the state in such a sense as to make it amenable to the jurisdiction of the courts thereof is not one of local law or of statutory construction; it is one of jurisdiction, or general law, or private international law, *and in the last analysis is one of due process of law under the constitution of the United States.*" (Emphasis added.)

Attempts by state courts to immunize their judgments from review by this Court on spurious "non-federal" grounds have met with consistent rejection. Such devices "cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior [state] decisions, seek vindication in state courts of their federal constitutional rights." *NAACP* v. *Alabama*, 357 U.S. 449, 457-58 (1958). Moreover, it is within this Court's province "to inquire not only whether the [federal] right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support." *Ward* v. *Love County*, 253 U.S. 17, 22 (1920). To the same effect, see *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773 (1931); *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U.S. 113, 121-23 (1935); *International Harvester Co.* v. *Missouri*, 234 U.S. 199, 206-07 (1914).

(2) All of the questions presented by this appeal were raised explicitly in federal constitutional terms in appellant's petition for rehearing in the Oklahoma Supreme Court. Because of the novel, unprecedented, and wholly unanticipated decision of that court on the merits as well as on the applicability of the "long arm" statute, appellant clearly availed itself of the most seasonable opportunity it had to point out to the court the deprivation of federal constitutional rights which its decision threatened.

Although this court ordinarily will not consider federal questions first raised in a petition for rehearing in the state court, *Herndon* v. *Georgia*, 295 U.S. 441 (1935), it is well established that questions thus raised are timely and reviewable here if the state court's ruling, grounds of decision, or construction of a statute could not have been reasonably anticipated. *Id.* at 443-44; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 319-20 (1930); *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930); *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358, 367 (1932); *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917).

As noted above, this is the first instance in which the Oklahoma Supreme Court has construed and applied 18 Oklahoma Statutes §§ 1.17 and 472 to subject an out-of-state publishing company such as appellant to be sued for libel in Oklahoma by substituted service. To arrive at this novel construction, the court hatched the equally novel concept that an independent wholesaling company in the State which is neither agent, servant, nor subsidiary of a foreign corporation is nonetheless "a mere conduit" through which the latter is "doing business" in Oklahoma.

This ingenious and unheard-of ruling was surprising enough, but the court proceeded to outdo it on the merits of the case. Although it could find *no* prior group libel case in Oklahoma history where a plaintiff not named in the alleged libel had so much as survived the defendant's motion for a directed verdict of no liability, the court not only leaped this chasm but went on to hold for the first time that the *plaintiff* in such a case was entitled to a directed verdict.

The court cited two of its prior decisions which it said had held publications *"libelous per se"* where the publications "did not name the plaintiff," *i.e.*, *Kelly* v. *Roetzel*, 64 Okla. 36, 165 Pac. 1150 (1917), and *Oklahoma Publ. Co.* v. *Tucker*, 124 Okla. 202, 254 Pac. 975 (1927). (P. 15a, *infra*; R. 310.) However, neither of these cases involved group

libel. In each the publication appeared in a newspaper article in a small town and was aimed squarely at the plaintiff. In *Kelly* the plaintiff, Joseph Roetzel, was clearly identified in the article by his nickname, "Joe," and "Grand Jury Joe." In *Tucker* the article accused "the municipal judge" of Afton, Oklahoma, who could have been no one but the plaintiff, of certain corrupt practices. Moreover, it appears from the opinions in both cases that all factual issues, including whether the article was of and concerning the plaintiff, were submitted to the jury.[11]

In the group libel case of *Owens* v. *Clark*, 154 Okla. 108, 6 P. 2d 755 (1931), the publications did not name the plaintiff and were held as a matter of law to be not actionable. In trying to avoid the clear thrust of the *Owens* case, the court below drew the distinction that the publication involved there was not aimed at the whole group but only at "certain members" thereof. (P. 17a, *infra;* R. 314.)

Examination of the *Owens* decision quickly lays bare the falsity of this distinction. The libel suit was based upon a series of newspaper articles concerning alleged corruption in the Oklahoma Supreme Court.[12] The plaintiff was a Justice of the Oklahoma Supreme Court who was not mentioned by name in the articles. Several quotations from the articles appear in the opinion, and it is crystal clear that some of them attacked *both* the entire Supreme Court

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[11] Thus, in *Kelly*, it was said that "*The jury found* that each of these articles was published of and concerning the plaintiff, and that they were understood by persons who read the same as referring to plaintiff . . . ." 64 Okla. at 39. (Emphasis added.) And see 124 Okla. at 204.

[12] The Governor of Oklahoma appointed a *pro tem* panel of special judges to hear and decide the appeal in the *Owens* case.

of Oklahoma *and* "certain members" thereof.[13] Although the opinion in *Owens* does say, in describing one of the articles, that "The article was not published about the Supreme Court, but about certain members of the Supreme Court . . . ," (p. 17a, *infra*), the opinion does not end there. It later points out that one of the articles *was* about the whole Supreme Court as well as certain of its members: "While the article complained of was bitter and a severe criticism upon the official acts *of the Supreme Court and of certain of its members* . . . ," it did not exceed the bounds of privilege, "and plaintiff not being specifically referred to therein, and we being unable from reading the entire article to single out plaintiff as the object of the publication, we must conclude that the same is not libelous per se. . . ." (154 Okla. 113-14.) (Emphasis added.) This was in accord with the principle consistently repeated and followed in Oklahoma libel cases that:

> "A publication is actionable per se when the language used therein is susceptible of but one meaning, and that an opprobrious one, *and the publication on its face shows that the derogatory statements, taken as a whole, refer to the plaintiff and not to some other person.*" (Emphasis added.)

E.g., Hargrove v. *Okla. Press Pub. Co.*, 130 Okla. 76, 265 Pac. 635 (1928); *Fite* v. *Okla. Pub. Co.*, 146 Okla. 150, 293 Pac. 1073 (1930); *Marland Ref. Co.* v. *Harrel*, 167 Okla. 548, 31 P. 2d 121 (1934). Even stronger to this effect is *Edwards* v. *Crane*, 292 P. 2d 1034 (Okla. 1956).

In sum, there can be no doubt that the decision below constituted an abrupt and completely unpresaged about-

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[13] For example, one of the articles stated: "*The Supreme Court has been charged* because of its action in the Dobney-Searcy political controversy (121 Okla. 193, 249 P. 381), with depriving the citizens of their constitutional rights. *Certain members of the Supreme Court have also been charged* with lending its power, and making of it, the lower courts and the legal machinery of the state, a tool for use in private controversies . . . ." 154 Okla. at 109. (Emphasis added.)

face from prior Oklahoma law of many years standing. Appellant's federal questions, having been explicitly raised in the petition for rehearing after this unexpected action, were therefore timely and are properly before this Court. As Mr. Justice Holmes observed in *Saunders* v. *Shaw*, *supra*, "[I]t would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here." (244 U.S. at 320.)

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal urgently require resolution by this Court. Necessity of review is particularly compelling because the decision below is in clear and direct conflict with holdings by federal circuit courts of appeal and other state courts of last resort on an important and recurring federal constitutional question. All the questions presented herein are significant and far-reaching ones which have not been, but clearly should be, resolved by this Court.

I.

The question of how far a state may go in subjecting out-of-state defendants to personal suit without obtaining actual service of process within the state is inherently and self-evidently a question of due process of law under the Fourteenth Amendment, of which this Court is the final arbiter. *Pennoyer* v. *Neff*, 95 U.S. 714 (1877); *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945); *Hanson* v. *Denckla*, 357 U.S. 235 (1958).[14] The decision of the court below extending the reach of the State's "long arm" statute to acquire *in personam* jurisdiction of a foreign publisher is not in accord with the past rulings of this

[14] See Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. Chi. L. Rev. 569 (1958); *Developments in the Law—State Court Jurisdiction*, 73 Harv. L. Rev. 909, 919-35 (1960).

Court, and is in sharp conflict with holdings by federal courts of appeal and the highest courts of other states. In each of these conflicting cases the foreign publisher had the same *or more* contacts with the forum state as appellant in this case. In each it was held that the state could not, consistently with the due process tests formulated by this Court, subject the out-of-state publisher to suit by substituted service.

In *Putnam* v. *Triangle Publications*, 245 N.C. 432, 96 S.E. 2d 445 (1957), a libel suit was filed in North Carolina against a foreign magazine publisher and summons was served on the Secretary of State on the theory that the publisher was "doing business" in the State, and hence was subject to suit under the State's "long arm" statute. The suit was based on an article in one of numerous magazines which defendant published and sold to eighteen independent wholesale distributors in North Carolina. The wholesalers resold the magazines to retail outlets, were billed as of the first of the month for all magazines received from defendant, and were given credit for unsold copies evidenced by returning torn covers to defendant. The defendant had no office, property, or telephone listing in the State, no writers or reporters there, and no agents to collect money. It did have three traveling representatives who regularly visited in North Carolina and surrounding states to promote retail sales of the magazines. These traveling representatives called on retailers to observe their displays, and obtained sales figures, statistics, and other information. In addition, defendant's magazines contained a few advertisements placed on behalf of North Carolina firms.[15]

The Supreme Court of North Carolina observed that the question of whether a foreign corporation is "doing busi-

[15] It is thus apparent that the defendant publishing company in *Putnam* had somewhat greater contacts with the forum state than appellant in the case at bar.

ness" so as to be subject to the jurisdiction of the state's courts "is essentially a question of due process under the U. S. Constitution, Amendment 14, § 1, which must be decided in accord with the decisions of the U. S. Supreme Court." (96 S.E. 2d at 450.) The court carefully reviewed the *International Shoe* decision and related federal cases and concluded that the defendant could not constitutionally be held amenable to suit in North Carolina by substituted service. The court stated:

> "Defendant has not transacted or done business in the State of North Carolina, and has not been present therein. The activities and contacts of its promotional employees within the State, as above set forth, are irregular, isolated, casual and insubstantial items; they are trivial and purely incidental to the ordinary publishing business carried on by defendant." (96 S.E. 2d at 449.)

The Court of Appeals for the Seventh Circuit reached the same conclusion in *Insull* v. *N.Y. World Telegram Corp.*, 273 F. 2d 166 (1959), *cert. denied*, 362 U.S. 942. In that case libel suits brought in Illinois against out-of-state publishing corporations by substituted service were held properly dismissed on the ground that the defendants were not "transacting business" in Illinois under that State's "long arm" statute. Defendants sold and shipped numerous publications into Illinois each day to individual subscribers, wholesale distributors, and newsstands. The court adhered to its prior ruling in *Schmidt* v. *Esquire, Inc.*, 210 F. 2d 908 (C.A. 7th Cir., 1954), *cert. denied*, 348 U.S. 819, which held that a foreign publisher selling magazines to individual subscribers and wholesalers in Indiana was beyond the reach of that State's "long arm" statute.

In the *Esquire* case, *supra*, the Court of Appeals pointed out that it was unnecessary to consider whether, as a matter of state law, the Indiana "long arm" statute was meant to go as far as the decisions of this Court would permit, because in no event could it go farther. To have held the

foreign publisher amenable to suit in Indiana would have clearly overreached the due process limitations of *International Shoe* and other federal cases. The court observed:

> "Esquire, Inc., is a corporation foreign to the State of Indiana and is not licensed nor admitted to do business there. It publishes the Esquire and Coronet magazines, which are available in Indiana either through subscription or at the newsstand. These magazines are printed in Chicago and are mailed directly from there to Indiana by the Curtis Circulation Company, an independent corporation which purchases the magazines from Esquire and effects distribution through independent wholesale organizations. Esquire has no office of any kind in Indiana, and it has no employees or agents there to gather material for publication, nor to solicit advertising, subscriptions or newsstand sales.
>
> "Under these facts, we do not see how it can seriously be contended that Esquire was amenable to suit in Indiana. . . . Obviously, the necessary contacts with the state are absent here." (210 F. 2d at 916.)

It should be further noted that in the *Esquire* case the court explicitly followed the like decision of the Fourth Circuit in *Cannon* v. *Time, Inc.*, 115 F. 2d 423 (1940). There the foreign magazine publisher sold and delivered its magazines to an independent wholesaling firm in Virginia which in turn sold them to local retailers. In addition, this wholesaling firm solicited and collected for local subscriptions to the publisher's magazines. It was held that this distributor was doing business on its own account and not as agent (or "conduit") for the publisher, and that the latter was not amenable to suit for libel in Virginia as a matter of federal due process.

Cannon of course antedates *International Shoe*. However, the fact that *Cannon* was expressly approved and followed by the Seventh Circuit in the *Esquire* case reveals that that court does not consider *International Shoe* to have changed prior case law holding foreign publishers, who

operate as does appellant in this case, to be not amenable to local jurisdiction by substituted service. This is further evidenced by the more recent *Insull* decision, supra, in which the Seventh Circuit approvingly cited numerous pre-*International Shoe* decisions which involved foreign publishers and which held to the same effect as *Cannon*, *Esquire*, and *Putnam*. (273 F. 2d at 770-71.)[16]

Other foreign publisher cases which are in accord with the above decisions, and which are in square conflict with the decision in the present case, are: *Street & Smith Publications, Inc.* v. *Spikes*, 120 F. 2d 895 (C.A. 5th Cir. 1941), *cert. denied*, 314 U.S. 653; *Whitaker* v. *Mac Fadden Publications*, 70 App. D.C. 165, 105 F. 2d 44 (C.A.D.C. Cir., 1939); *Layne* v. *Tribune Co.*, 71 F. 2d 223 (C.A.D.C. Cir., 1934); *Neely* v. *Philadelphia Inquirer Co.*, 62 F. 2d 873 (C.A.D.C. Cir., 1932); *Reed* v. *Real Detective Pub. Co.*, 63 Ariz. 294, 162 P. 2d 133 (1945); *Lee* v. *Memphis Pub. Co.*, 195 Miss. 264, 14 So. 2d 351 (1943); *Hildreth* v. *Radio, Ltd.*, 36 N.Y.S. 2d 978 (1942).

Federal district court holdings which are in clear conflict with the decision of the Oklahoma Supreme Court are: *Gayle* v. *Magazine Management Co.*, 153 F. Supp. 861 (M.D. Ala., 1957); *Brewster* v. *Boston Herald-Traveler Corp.*, 141 F. Supp. 760 (D. Me., 1956); *Moorehead* v. *Curtis Pub. Co.*, 43 F. Supp. 67 (W.D. Ky., 1942); *Kriger* v. *Mac Fadden Publications, Inc.*, 38 F. Supp. 472 (D.C. Md., 1941); *Merrimon* v. *Martindale-Hubbell, Inc.*, 36 F. Supp. 182 (E.D.S.C., 1940); *Creager* v. *P. F. Collier & Son*, 36 F. 2d 783 (S.D. Tex., 1929).

The contrary opinion of the court below is a work of *a posteriori* rationalization that cannot withstand analysis. On the basis of a non-objective interpretation of the stand-

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[16] In *Putnam* also, the Supreme Court of North Carolina cites and relies upon many of these same pre-1945 decisions involving out-of-state publishers. *Putnam* v. *Triangle Publications*, 245 N.C. 432, 96 S.E. 2d 445, 451-53 (1957).

ard wholesale distributor's agreement between appellant and Mid-Continent News Company and the "activities" of appellant's tri-state representative, the opinion labels Mid-Continent "a mere conduit" through which appellant is "doing business" in the state, and thus subject to its jurisdiction. Having served its purpose, the "conduit" is later torn up, forgotten, and held as a matter of law to be absolved of any responsibility. To indulge in this chain of sophistry "is surely to move in the world of Alice in Wonderland." *Olberding* v. *Illinois Central R. Co.*, 346 U.S. 338, 341 (1953).

The wholesale distributor's agreement between appellant and Mid-Continent[17] contains only the usual and customary conditions placed by other publishers of dated periodicals upon wholesale distributors. Unsalability of out-of-date periodicals necessitates that publishers give credit for unsold copies, and this in turn requires assurances that wholesalers will conscientiously promote efficient retail merchandising of the periodicals. These routine and minimal undertakings do not dilute the wholesaler's status as a legally separate and independent buyer and seller. Periodical wholesalers typically buy from numerous publishers—Mid-Continent itself buys from eighteen (R. 93)—which further highlights the independent and arms-length character of their dealings with publishers.

These realities have been candidly recognized by the numerous decisions of other courts, cited above, which hold that federal due process precludes assumption of state "long arm" jurisdiction on the facts here involved. This clearly accords with the principles evolved by this Court. In *Hanson* v. *Denckla*, 357 U.S. 235 (1958), the Court took stock of these principles, pointing out that technological advances in communications and transportation have been accompanied by an evolution in the requirements for per-

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[17] See Appendix "E" (pp. 37a-43a, *infra*).

sonal jurisdiction over nonresidents "from the rigid rule of *Pennoyer* v. *Neff*, 95 U.S. 714, to the flexible standard of *International Shoe Co.* v. *Washington*, 326 U.S. 310." The Court then admonished:

> "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of the state courts. See *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 418. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a pre-requisite to its exercise of power over him. See *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319." (357 U.S. at 251.)

These "minimal contacts" were stated to mean that a defendant at least must engage in some act by which it "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253.

II.

Closely interrelated with the above question regarding due process validity of *in personam* jurisdiction over nonresident publishers is a critical issue of encroachment upon freedom of the press. This issue is of vital concern to all of the many publishers in this country—large and small—who make multi-state sales of periodicals to wholesale distributors.

Whether or not so-called "libelous utterances" are afforded protection by the First Amendment, cf. *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952), there can be no doubt that irresponsible or provincially vindictive libel actions seriously inhibit freedom of the press. This inhibition will surpass the oppression of outright censor-

ship if publishers are to be subjected by "long arm" service to the manifold vagaries of local libel laws in all jurisdictions. If, as the judgment below indicates, publishers can be summoned to alien forums and adjudged liable as a matter of law to pay unlimited "presumed" damages on the basis of a publication which has aroused the pique of local partisanship but has not been proved to refer to or harm any individual, then it is obvious that a weapon has been found with which to silence any publisher. Cf. *New York Times Co.* v. *Sullivan*, 144 So. 2d 25 (Ala., 1962), *cert. granted*, January 7, 1963 (No. 606, this Term). Freedom of the press cannot long withstand such onslaughts.

Because of the unique nature of the business in which the press engages and the special place it occupies in our constitutional system, see *e.g.*, *Smith* v. *California*, 361 U.S. 147 (1959), the validity of substituted service in libel suits against nonresident publishers demands a stricter test than the usual balancing of convenience and interest factors applicable in contract suits, *e.g.*, *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957), and personal injury litigation, *e.g.*, *Hess* v. *Pawloski*, 274 U.S. 352 (1927). The destructive and often wholly opportunistic character of actions brought in hostile forums by local favorites who fancy themselves libeled surely requires that the publisher's interest—and the concomitant public interest in freedom of speech and press—be afforded protective consideration. These interests, and the traditional concepts of "fair play and substantial justice," *International Shoe*, *supra*, at 320, combine to compel recognition of the fact that a publisher whose contacts with a state are no greater than those of appellant here has not thereby "purposely avail[ed] itself of the privileges of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. at 253.

Historically, trial for libel in a foreign and hostile environment has long been a favorite instrument of tryannical

governments for the suppression of freedom of speech and press. The notorious Star Chamber in England (a tribunal that asserted unlimited jurisdiction over persons and crimes) tried many such defendants in London regardless of the situs of their homes or their "crimes"; even foreigners who committed alleged crimes outside England stood trial before the Chamber. Scofield, *A Study of the Court of Star Chamber* (1900). In this country, the practice of trying American colonists away from home and particularly in England became so cruel and unjust that, when the break with England finally occurred, this practice was prominently cited in the Declaration of Independence.[18]

While some of history's more dramatic abuses in the libel area have occurred in criminal libel cases, the civil libel suit provides an even deadlier weapon for suppressing free speech and press. A publisher can be permanently put out of business by mulcting it in damages for thousands, or even millions, of dollars. Moreover, the defendant enjoys none of the safeguards afforded to criminal libel defendants: no grand jury indictment is required; the proof need not be beyond a reasonable doubt; the defendant is not presumed to be innocent; a defendant's verdict may be set aside and a new trial ordered; and if the defendant wins in the trial court, the plaintiff can always appeal. For a lucid and thorough discussion of this subject, see *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923).

Furthermore, it should be noted that the civil libel plaintiff can bring *separate suits* against a publisher in as many

[18] "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these states. To prove this, let facts be submitted to a candid World. . . . He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws: . . . For depriving us in many cases, of the benefits of Trial by Jury: . . . For transporting us beyond Seas to be tried for pretended offenses."

states as the allegedly libelous publication appears, provided of course that *in personam* jurisdiction of the defendant can be acquired in each state. This is by no means a speculative or remote contingency. As Dean Prosser has observed:

> "The consequences of these multiple causes of action are scarcely attractive. The opportunity is afforded for a litigious or vindictive plaintiff, or one who is merely seeking a bargaining position for purposes of extortion, to subject the defendant to repeated suits in every state in which he can get jurisdiction, or, since the action is transitory, even in one state. Since the causes of action are distinct, a judgment in one is not res judicata in any other; and it is the prevailing rule, except as it has been changed by statute in New York and Massachusetts, that the defendant may not even introduce evidence of such a judgment in mitigation of damages, or tell the jury that the plaintiff may have an opportunity to seek reimbursement in other suits. The 'chain libel suit' which can result is no figment of the imagination." Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959, 968-69 (1953) (citations omitted).

The author cites many actual instances of chain libel suits, and concludes that the menace which all this carries to publishers "is too obvious to require comment." Another writer on the same subject has pointed out, "The possibility of libel suits or threats of libel suits being used to put some paper or columnist out of business is not to be dismissed lightly...." Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 Va. L. Rev. 867, 874 (1948). See also Ernst and Lindley, *Hold Your Tongue* c 11 (rev. ed. 1950).

III.

On the merits, the judgment below is an unconscionably abusive and arbitrary exercise of state judicial power.

Upon no evidence whatever that anyone understood the allegedly libelous publication to refer to the plaintiff, much

less to impugn him in any way, and upon plaintiff's own assertion that he did not consider his reputation tarnished in the slightest, the trial court held as a matter of law that the plaintiff had been libeled, and left the jury wholly at large in assessing the presumed "damages." The resulting fine—it cannot realistically be viewed as anything else—was $75,000.

According to all the applicable precedents of Oklahoma law (see pp. 20-22, *supra*), if anyone was entitled to a directed verdict on the libel issues it was appellant. At the very least, the precedents indicated that appellant was entitled to a jury trial (see pp. 20-22, *supra*). When all this was brought to the attention of the Oklahoma Supreme Court, that tribunal abruptly executed a hairpin turn from prior law and affirmed the trial court.

This judgment cannot be squared with federal constitutional limitations upon state power. The barest modicum of fair play and substantial justice required that appellant be afforded the right of a jury trial on the factual libel issues. Certainly this right would have been afforded in a federal court. See, *e.g.*, *Dimick* v. *Schiedt*, 293 U.S. 474 (1935); *Curtis Publishing Co.* v. *Vaughn*, 278 F. 2d 23 (C.A. D.C. Cir., 1960), *cert. denied* 364 U.S. 822; *Sweeney* v. *United Feature Syndicate*, 129 F. 2d 904 (C.A. 2d Cir., 1942).

The due process clause of the Fourteenth Amendment requires that the same right be extended in the state courts. "The right of trial by jury in civil cases at common law" has been accurately described by this Court to be "a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob* v. *City of New York*, 315 U.S. 752, 752-53 (1942). Moreover, this Court has admonished:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935).

This admonition was recently reiterated in *Beacon Theatres* v. *Westover*, 359 U.S. 500, 501 (1959).

It is beyond question that a substantial "curtailment" of the right to trial by jury has occurred in this case. Whether this "fundamental and sacred" right be viewed as one that is "implicit in the concept of ordered liberty," *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), or as one of the basic rights secured to every citizen by the first eight Amendments to the Constitution and incorporated in the due process clause of the Fourteenth, the right has been annulled in this case by the short-cut procedure employed below to adjudicate appellant guilty of libel. The right should be restored by this Court, and any doubt removed for the future that this right is beyond the power of states to abridge. See *Robinson* v. *California*, 370 U.S. 660 (1962); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Gideon* v. *Cochran, cert. granted*, 370 U.S. 908 (1962), No. 155, this Term.

The judgment below cannot be defended on any supposition that the State courts could or did take judicial notice of facts or circumstances not demonstrated by record proof, in order to supply a tenable basis to hold that appellee was libeled as a matter of law. We stress again that *no* evidence was adduced to prove that anyone understood this publication to refer to appellee, to accuse him of a crime, to malign him in any way, or to sully his reputation in the least. Team officials testified that a physician was in constant attendance on, and supervised all medical treatment of, the players. The size of the group varied from 60 to 70 members, the article did not say the "spray" was administered to all members in all games, and appellee himself

testified that he missed two games during the season in question. Cf. *Owens* v. *Clark* (discussed at pp. 21-22, *supra*).

These evidentiary shortcomings cannot be spanned or shunted aside by the cavalier assertion of the court below that it was "mindful" that appellee "would not be overlooked" by persons who were "familiar" with the team.[19] To press the doctrine of "judicial notice" to this extreme would clearly be "to do through argument . . . what is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial.'" *Garner* v. *Louisiana*, 368 U.S. 157, 173 (1961); *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n.*, 301 U.S. 292, 302 (1937).

Indeed, the complete failure of proof of the essential elements of libel in this case calls clearly for application of the due process mandate which forbids imposition of liability when the record is totally devoid of evidentiary support for the adjudication. *Garner* v. *Louisiana*, *supra*; *Thompson* v. *Louisville*, 362 U.S. 199 (1960). The fact that this is a civil suit rather than a criminal prosecution does not afford any basis for arguing that the *Garner-Thompson* rule should not apply. Such a distinction would leave states free to accomplish under the guise of civil proceedings what they are foreclosed from doing by criminal prosecutions, namely, to inflict penalties without proof of blameworthy conduct.

IV.

The action of the trial judge in opening the courtroom to cameramen for television, movies, and the press, and in permitting and supervising photography of the jurors and other participants in the trial, worked a direct deprivation of appellant's right to a fair trial as guaranteed by the due process clause of the Fourteenth Amendment.

Because of the character and subject matter of the complaint being tried, the trial was naturally one that gen-

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[19] P. 22a, *infra*; R. 322.

erated extreme local excitement, curiosity, and antagonism. The circumstances demanded utmost care and effort on the trial judge's part to preserve a calm and dispassionate courtroom atmosphere conducive to a genuine search for truth. Any jury would be keenly enough aware of the circus atmosphere prevailing outside the courtroom among their friends and neighbors, without being goaded by the added realization that their faces would appear on television and in the papers—exactly as they looked inside the courtroom confronting the defendant. Since the jury in this case was not locked up during nightly recess, the jurors had full opportunity themselves to take in the courtroom pictures and the accompanying news commentary.

It is no answer at all to say that the photography occurred during a "recess." The *bona fides* of the "recess" are questionable, since all participants in the trial were under instructions to remain in their places while the pictures were being taken, and since the judge formally asked during the "recess" if counsel had "any objection " to the obviously foreordained photography.

In any event, the photography occurred inside the courtroom, with the full sanction and blessing of the trial judge, and before the jury retired for its deliberations. Whether or not the picture-taking interval was a true recess, it was a special, limelight event which could not help but have impressed the jurors profoundly with the fact that the eyes of Oklahoma were upon them. Appellant was under enough disadvantage because of the locale of this law suit without being exposed to this additional and uncalled for cross-fire. In the circumstances of this case, the action of the trial court in permitting photography in the courtroom patently offended due process concepts of fair play and orderly administration of justice. *Irvin* v. *Dowd*, 366 U.S. 717 (1961); *Marshall* v. *United States*, 360 U.S. 310 (1959); *Frank* v. *Mangum*, 237 U.S. 309, 345-50 (1915) (dissenting opinion); *State* v. *Clifford*, 97 Ohio App. 1, 118 N.E. 2d 853 (1954); *Ex Parte Sturm*, 152 Md. 114, 136 Atl. 312 (1927).

The Judicial Conference of the United States, at its meeting on March 12, 1962, adopted by unanimous vote a resolution barring all photography in the federal courts. The resolution states:

> "Resolved, that the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court."

No reason exists why such practices should be permitted in the state courts. The photography in the instant case would clearly have fallen under the ban of this resolution. Of course, it directly flouted Canon 35 of the American Bar Association's Canons of Judicial Ethics, which declares categorically that the "taking of photographs in the courtroom, during sessions of the Court or recesses between sessions . . . should not be permitted." The reasons behind this Canon reflect precisely the same considerations which underlie the due process safeguards evolved to insure fair trials. As Dean Griswold has observed, in urging the whole legal profession to stand together against any relaxation of Canon 35:

> "A courtroom is not a stage; and witnesses and parties are not players. A trial is not a drama, and it is not held for public delectation, or even public information. It is held for the solemn purpose of endeavoring to ascertain the truth; and very careful safeguards have been devised out of the experience of many years to facilitate that process." Griswold, *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered*, 48 A.B.A.J. 615 (1962).

CONCLUSION

For the above reasons, appellant submits that this appeal presents federal questions of national importance which warrant plenary resolution by this Court.

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APPENDIX

APPENDIX A

Constitutional and Statutory Provisions Involved

The FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

The SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION provides in pertinent part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

The FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION provides in pertinent part:

> "Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE I, SECTION 1 of the OKLAHOMA CONSTITUTION provides:

> "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

ARTICLE II, SECTION 7 of the OKLAHOMA CONSTITUTION provides:

> "No person shall be deprived of life, liberty, or property, without due process of law."

SECTION 1.17 of TITLE 18, OKLAHOMA STATUTES (1961), provides as follows:

"a. Every corporation shall have and continuously maintain in this State a registered agent, on whom service of summons may be had. In the case of a domestic corporation, such agent may be an individual, resident of this State, whose business address is identical with the registered office of each domestic corporation, and in the case of a foreign or domesticated corporation, such registered agent shall be a resident of the capitol city.

"b. Such registered agent shall be an agent of such corporation upon whom may be served any process, notice, or demand required or permitted under the laws of this State to be served upon a corporation.

"c. In the event any domestic corporation, or any foreign corporation engaging in or transacting business in this State, shall fail for any reason whatsoever to maintain such registered agent in this State, in lieu of any such service, notice, or demand upon such registered agent, or upon any other agent or representative as provided by law, any party in a cause of action against such corporation may have service of summons or other process, notice, or demand upon the Secretary of State, and such service of process shall be sufficient to give jurisdiction of the corporation to any court in this State having jurisdiction of the subject-matter of the cause.

"d. Any corporation may change its registered agent in this State or fill any vacancy at any time as it may see fit. Such change may be made by filing in the office of the Secretary of State a certificate showing such change signed by the president or a vice-president and attested by the secretary or an assistant secretary.

"c. Any person who has been designated by a corporation as its registered agent for service of process may file with Secretary of State a signed statement that he is unwilling to continue to act as the agent of such corporation for the service of process, including in such statement the post office address of such corporation. Upon the expiration of thirty (30) days after the filing of such statement with the Secretary of State the capacity of such person as such agent shall terminate. Upon the filing of such statement the Secretary of State forthwith shall give written notice, by mail, to such corporation of the filing of such statement and the effect thereof, which notice shall be addressed to such corporation at the post office address given in such statement."

SECTION 472 of TITLE 18, OKLAHOMA STATUTES (1961), provides as follows:

"In the event of any foreign corporation doing business or having done business within the State of Oklahoma, and having failed either to appoint an agent upon whom service of summons or other process could be had, or failed to file in the office of the Secretary of State duly authenticated copy of its Articles of Incorporation or Charter, or having failed to pay the license fee as required by law, any person now having or hereafter having any cause of action against any such foreign corporation, which cause of action arose out of the said foreign corporation doing business within the State of Oklahoma, or while the said foreign corporation was doing business within the State of Oklahoma, may file suit against such foreign corporation in any county in the State, and service of summons or any process upon the Secretary of State shall be sufficient to warrant said Court in rendering a personal judgment against said corporation, and said service upon the Secretary of State shall be had in manner

and form as follows, towit: The Plaintiff in his petition in said cause of action shall set forth the postoffice address of the Secretary of said foreign corporation, and the Court Clerk of the court in which said petition is filed shall upon the praecipe of the plaintiff forward said summons forthwith to the Secretary of State, together with the postoffice address of said secretary of said corporation and the service fee herein provided for, and said Secretary of State shall immediately forward a copy of said summons to the secretary of said corporation so sued, and thereupon the Secretary of State shall make return of said summons to the court from whence the same issued, showing the date of its receipt by him, the date of forwarding such copy to the said secretary of said corporation. and the address of such secretary to whom he forwarded said copy, and the costs for service and return thereof, which in each case shall be $3.00 which shall be paid into the State Treasury as other revenues of the Secretary of State are handled. Such return shall be under the hand and seal of the office of said Secretary of State, and shall have the same force and effect as a due and sufficient return made by the sheriff on process directed to him. The Secretary of State shall keep a suitable record book in which he shall docket every action commenced against a foreign corporatioin in which he has made service as aforesaid, which record shall show the court in which the suit is brought, the title of the cause, the time when commenced, the date and manner of service, and the date of payment of the fee taxed as costs in the case."

APPENDIX B

Opinions and Judgment of the Oklahoma Supreme Court

Filed
In Supreme Court
of Oklahoma
July 17, 1962
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 39,485

FAWCETT PUBLICATIONS, INC., *Plaintiff in Error,*

v.

DENNIT MORRIS, *Defendant in Error.*

• • • • • • • • • • •

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HON. CLARENCE M. MILLS, *Judge*

Action for damages for libel by plaintiff, Dennit Morris, against Fawcett Publications, Inc., publisher, and Mid-Continent News Company, distributor; from judgment in favor of plaintiff against Fawcett Publications, Inc., said defendant appeals; and from judgment sustaining defendant Mid-Continent News Company's motion for directed verdict and dismissal of action, plaintiff, Dennit Morris, cross-appeals.

Affirmed

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JACKSON, *J.:*

In the trial court, plaintiff Dennit Morris sued Fawcett Publications, Inc., the publisher of "True" Magazine, and Mid-Continent News Company, its distributor, for damages for libel. The suit grew out of an article in a 1958 issue of "True" Magazine entitled "The Pill That Can Kill

Sports", concerning the use of amphetamine and other similar drugs by athletes throughout the country.

Plaintiff alleged in his petition that he was a member of the 1956 Oklahoma University football team; that the article imputed to him a crime against the laws of the state of Oklahoma and was libelous per se; and asked for general damages in the amount of $100,000, and punitive damages in the amount of $50,000.

At the conclusion of the evidence, the trial court instructed the jury to return a verdict against Fawcett, leaving only the amount of the damages for jury determination. Mid-Continent's motion for directed verdict in its favor was sustained.

The jury returned a verdict for plaintiff and against Fawcett in the amount of $75,000 for actual damages.

Fawcett is a foreign corporation without a service agent in this state, and service was had upon Fawcett herein by serving the Secretary of State pursuant to Statute. On appeal, Fawcett, for its first proposition, argues that the court had no jurisdiction for the reason that Fawcett was not "doing business" in the state within the meaning of 18 O.S. 1961, Sections 1.17 and 472, which authorize service upon the Secretary of State.

From uncontradicted evidence in the record, it appears that Fawcett had contracted with Mid-Continent to distribute its magazines in a portion of the State of Oklahoma. The "territory" is not described in the contract, and is left for all practical purposes to the discretion of Fawcett. Magazines were to be forwarded to Mid-Continent without specific orders, in amounts entirely within the discretion of Fawcett. Mid-Continent agreed to distribute not only the magazines and books named in the contract, but all "other matter" which Fawcett might choose to forward. All prices, sales dates and release dates were to be fixed by Fawcett and were subject to change at any time by Fawcett.

Mid-Continent agreed to keep dealer records acceptable to Fawcett, showing "initial distribution, re-orders, pickups, returns and net sales". Provision was made for "returns", and credit thereon, and Mid-Continent agreed to dispose of unsold copies in any manner Fawcett should direct. Mid-Continent agreed to distribute to its retail dealers all "advertising, dealers' helps, posters, circulars, and other material" which Fawcett chose to supply. It agreed to furnish Fawcett a complete list of its dealers, showing address and line of business, and showing each dealer's "draw" of each of Fawcett's magazines, publications and other matter. The contract was for 10 years, but could be terminated by either party "at any time with or without cause by giving ten (10) days written notice" to the other party.

Fawcett also employed a "traveling representative" whose duty it was to call on both wholesalers and retailers, to "check up" on the manner of distribution, display and sale of Fawcett's publications and other matter. He testified that the wholesalers "* * * have an agreement with our company to do certain things, such as the putting out of our magazines on certain dates and displaying them in certain ways in the retail outlets, drugstores, supermarkets and so forth, and it is just my job to go around and see that they are fulfilling their agreement with our company". Although he testified that he actually had no authority, he did make reports to Mid-Continent and to his home office concerning his findings. He also made "suggestions" to Mid-Continent and the retailers as to the proper display and sale of his company's publications.

It thus appears that although the contract refers to Mid-Continent as an independent contractor, Fawcett retained almost unlimited discretion as to the details of the distribution, promotion, display and sale of its publications.

It should be noted here that the jurisdictional question raised in the brief of plaintiff in error (Fawcett) is re-

stricted entirely to the question of whether Fawcett was "doing business" in Oklahoma within the meaning of 18 O.S. 1961, Section 1.17 and 472. No question of due process under the Fourteenth Amendment of the United States Constitution is presented.

The question of whether a foreign corporation is "doing business" within this state within the meaning of the statute must depend upon the facts in each particular case. S. Howes Company v. W. P. Milling Co., Okl., 277 P. 2d 655 at page 657; 20 C.J.S. Corporations Section 1920 at page 151.

In Wills v. National Mineral Co., 176 Okl. 193, 55 P. 2d 449, this court held:

> "Doing business involves not only ownership, possession or control of property, but also such functions as dealing with others in reference thereto, the exercise of discretion, the making of business decisions, the execution of contracts, the marketing of products by advertising and solicitation, collecting acounts, and kindred functions. Wherever an important combination of these functions is being performed, it is the doing of business at the place of such performance."

Without belaboring the question of when title to the magazines published by Fawcett actually moved to Mid-Continent (and thus the question of whether Fawcett owned property in Oklahoma) we have no doubt that Fawcett had practical *control* over such property even after it had reached the magazine racks of the retailer. As shown above, practically unlimited discretion, under the Fawcett contract with Mid-Continent, was reserved in Fawcett. As to the "marketing of products by advertising and solicitation", under the contract Mid-Continent was bound to distribute any advertising matter the company might send; as to solicitation, Mid-Continent was bound to "cooperate with *the Company's plans* to increase the sale of its maga-

zines" (emphasis supplied). Note that Fawcett was *not* required to cooperate with Mid-Continent's plans. From the practical standpoint, Fawcett could diminish or increase Mid-Continent's territory at will; it could set up and do business with any other competing distributor; it could require "check-up" reports on the retailers as often as it desired; it could send Mid-Continent as many, or as few, copies of any particular publication as it deemed advisable; it could cancel the contract without cause upon ten days' notice.

Considering the terms of the contract, and the activities of Fawcett's "traveling representative", we are forced to the conclusion that for all practical purposes Mid-Continent was little more than a mere conduit through which Fawcett exercised its own free and unhampered discretion as to all pertinent details of the business. Such being the case, and pursuant to the cited rule from Wills v. National Mineral Company, supra, Fawcett was doing business in Oklahoma within the meaning of 18 O.S. 1961, Sections 1.17 and 472. It follows that service upon the Secretary of State was authorized in this case, and that the court had jurisdiction of the defendant so served. Defendant's first proposition is therefore without merit.

The remaining propositions urged on appeal go to the merits of the case, and we therefore summarize the alleged libelous publication. The article is approximately seven full pages in length; was studiously prepared after what purports to be painstaking research; and starts at pages 44 and 45 of the magazine. Across the center of pages 44 and 45, we find in large letters and bold type the following:

"THE PILL that can KILL SPORTS"

In the upper left hand corner of page 44 are these words: "Simply by using a phony letterhead, the author purchased by mail enough drugs to hop up over 100 football teams." Immediately under this statement is the following: "A

SHOCKING REPORT:", which is emphasized by a red line underneath. In the middle of pages 44 and 45 is a picture of five bottles of pills; the sixth bottle is the shape and type commonly used for hypodermic needle injections; and there are two hypodermic needles. In the upper right hand corner of page 45 is found the following:

> "You can go to jail for selling amphetamine to a truck driver or injecting it into a racehorse, yet this same drug is being handed out to high school and college athletes all over the country."

In the lower half of page 45, and flowing over onto page 44, is pictured a heavily loaded dual-wheeled truck bearing the sign or label on its side, "DOPE". In the body of the truck are two individuals labeled "Averice and Ignorance" shovelling out dope to athletes, including football players, who are running behind the truck and catching the pills. Another person is handing out pills to a football player from the cab of the truck. Above the engine of the truck are these words: "Victory at any Cost".

Across the center of pages 46 and 47 is a picture of a stable with the heads of horses appearing from the windows. In front of the horses are what appear to be uniformed officials and trainers. Underneath this picture is printed the following: "Racehorses are scrupulously guarded against doping violations, yet the same drugs are given freely to young athletes."

While the article is too lengthy to be quoted, a few excerpts which appear to be fairly representative of the entire article are quoted as follows:

> "Definite proof that doping was a common practice came on September 13, 1956, when I received this report from the USOA's attorney, John T. McGovern. 'I have communicated with record executives of Olympic, university, A.A.U. organizations, athletic directors

and others . . . At every point of contact I was informed . . . that substantially the entire population in schools and colleges have been using this type drug . . . "

• • •

"The *amphetamines are administered to athletes by* hypodermic injection, *nasal spray*, or in tablets or capsules, but pills are the most common form, at least according to those athletic figures who are willing to talk."

• • •

"There is, however, one statistic which is available, and which strongly indicates that consumption is rapidly increasing. Recently, *I was able to buy 30 cc.'s of dextro-amphetamine sulphate for 95 cents.* This amount—*enough to hop up an entire football team*—cost three times this much a few years ago. Also, I was able to buy a thousand amphetamine pills for $1.40 less than a third of the 1954 price. When sales go up, prices go down.

"*Speaking of football teams*, during the 1956 season, *while Oklahoma was increasing its sensational victory streak*, several *physicians observed Oklahoma players being sprayed in the nostrils with an atomizer. And during a televised game, a close-up showed Oklahoma spray jobs to the nation.* 'Ten years ago,' Dr. Howe observed acidly, 'when that was done to a horse, the case went to court. Medically, there is no reason for such treatment. If *players* need therapy, they shouldn't be on the field.'

• • •

"*The 'lifter'* (amphetamine user) can and *does become heroic, boisterous, pugnacious, or vicious.*

• • •

"*These results are what make amphetamines useful in the field of athletics.* They promote agression, increase the competitive spirit, and work the same as the

epinephrine (adrenalin) produced in your body. The adrenal cortex, however, is wiser than victory-hungry coaches and athletes, * * * ." (Emphasis supplied).

The article refers to several nationally known brutal crimes as being committed by users of amphetamine.

Plaintiff's evidence at the trial shows that the substance administered to Oklahoma players and members of the 1956 football team was "spirits of peppermint", a harmless substance used for the relief of "cotton mouth", or dryness of mouth, resulting from prolonged or extreme physical exertion; that plaintiff did not use amphetamine or any other narcotic drug, and there was no evidence that any other member of the team used amphetamine or narcotic drugs.

Plaintiff's evidence further shows that plaintiff was fullback on the alternate squad of the 1956 football team; that he played in all games during the 1956 season, except two, when he was "side-lined" because of injuries; that the team won all ten regular games during the season and won the Bowl game at the end of the season in Miami, Florida; that plaintiff played in the Bowl game; that plaintiff was a sophomore in 1956 and continued to play on the team in 1957 and 1958; and that he was a member of the University baseball team while at the university. That there were sixty or seventy members of the team in 1956.

Plaintiff's evidence further shows that many people asked plaintiff about the article in True, beginning shortly after its publication, and continuing until shortly before trial.

In Fawcett's answer it was alleged that the facts set forth in the article were true; that the comments were fair and fairly warranted by the facts truly stated; that the article was privileged; that defendant was without malice and relied upon trustworthy sources; and that the article did not refer to plaintiff. However, since no attempt was made to

prove any of these allegations it may be said that the article, together with plaintiff's evidence is undisputed.

In Fawcett's second proposition it is said:

"The Article is not libelous per se.

"(A) The plaintiff was not named or referred to in the Article.

"(B) No person understood or believed the Article referred to the plaintiff.

"(C) The Article does not allege the plaintiff engaged in criminal activity and is not libel per se.

"(D) Plaintiff is a member of a large and changing group class and therefore the article is not libel per se."

We think the first question requiring attention under Fawcett's second proposition is whether the article is defamatory or libelous on its face. In this connection the courts have classified libelous words in the following categories: (See Kee v. Armstrong, Byrd & Co., 75 Okl. 84, 182 P. 494)

"Words charged to be libelous may be divided into three classes: First those that cannot possibly bear a defamatory meaning; second, those that are reasonably susceptible of a defamatory meaning, as well as an innocent one; third, those that are clearly defamatory on their face."

In determining whether the article is libelous on its face the article must be measured by its natural and probable effect upon the mind of the average lay reader. Hargrove v. Oklahoma Press Publishing Co., 130 Okl. 76, 265 P. 635.

In 12 O.S. 1961, Sec. 1441, libel is defined as a false publication by writing, printing, or picture, which exposes any person to public hatred, contempt, ridicule or obloquy, or

which tends to deprive him of public confidence, or to injure him in his occupation.

After reading the entire article and considering its effect upon the mind of the average lay reader, we are convinced that the article is clearly defamatory on its face and does expose the entire O.U. team to public hatred and contempt and tends to deprive the team and its membership of public confidence. The reader was unequivocally informed that the members of the team illegally used amphetamine; the article explained that amphetamine could be administered with a nasal spray and that for 95 cents one could purchase "enough to hop up an entire football team". The use of the phrase "hop up" negates any implication that the amphetamine was legally administered under the direction of a physician for medical purposes. The reference to the 1956 O.U. football team is so well tied into, or interwoven, into the article that the full weight and import of the article falls upon the O.U. team.

Having concluded that the article is defamatory and libelous on its face we think it follows that the article is *libelous per se*. However, in view of the prominence given to the subject of *libel per se* in Fawcett's brief and its contention that plaintiff's name must appear in the face of the article; and the superficial lack of harmony in the decisions from this court on what constitutes libel per se, we find it appropriate to consider the matter extensively.

Fawcett states that words alleged to be libelous fall within one of three categories as set forth in our quotation from Kee v. Armstrong, supra. That is: (1) those that cannot bear a defamatory meaning; (2) those that are reasonably susceptible of a defamatory meaning as well as non-defamatory meaning, and, (3) those whose only meaning is defamatory *of the plaintiff* on its face. It should be noticed at the outset, however, that our quotation of the first syllabus from Kee v. Armstrong, supra, does not contain the words "of the plaintiff".

Fawcett then states that the second class of libel, supra, "is referred to as libel per quod or libel per innuendo while the third class of libel is libel *per se*." We are in complete agreement that the third class is libel per se. However, we do not agree (as Fawcett seems to conclude) that it is necessary for plaintiff's name to appear in the article to render it libelous per se. The article in True falls into the third category.

Kelly v. Roetzel (1917), 64 Okl. 36, 165 P. 1150, and Oklahoma Pub. Co. v. Tucker (1927), 124 Okl. 202, 254 P. 975, are cases wherein this court held that the *words used* in the articles were *defamatory per se* and that each of the articles was *libelous per se*. The publications complained of in those cases did not name the plaintiff.

Fawcett invites our attention to Hargrove v. Oklahoma Press Pub. Co. (1928), 130 Okl. 76, 265 P. 635; Fite v. Oklahoma Pub. Co. (1930), 146 Okl. 150, 293 P. 1073; Wimmer v. Oklahoma Pub. Co. (1931) 151 Okl. 123, 1 P. 2d 671; Tulsa Tribune Co. v. Kight (1935), 174 Okl. 359, 50 P. 2d 350; and Marland Ref. Co. v. Harrel (1934), 167 Okl. 548, 31 P. 2d 121, wherein we said, or held, as follows:

> "A publication is actionable per se when the language used therein is susceptible of but one meaning, and that an opprobrious one, and the publication on its face shows that the derogatory statements, taken as a whole, refer to the plaintiff and not some other person." (Emphasis supplied).

If we correctly understand Fawcett's argument it is to the effect that the cited cases are authority for the proposition that the plaintiff must be named in the face of the article. This requires an examination of those cases.

In Hargrove, supra, the libelous publication was directed at William Hargrove, "a negro". In the article it was said that "Hargrove's wife appeared at the office of the

United States marshall * * * and paid Hargrove's fine." William Hargrove's wife, Florence Hargrove, a white woman, filed an action for damages upon the theory that she had been libeled. This court found that the article was *about* William Hargrove *and not* about Florence Hargrove. Obviously the court felt that it made a difference as to *whom* the article was written about. The applicable law where the article is not *about* the plaintiff is considered in an annotation in 69 A.L. R. at page 734, entitled "publication or statement as defamatory, by reason of extrinsic facts, of person not referred to nor intended to be referred to". However, this court in attempting to find the applicable law utilized the last above emphasized quotation which was taken from Rowan v. Gazette Printing Co., (Montana), 239 Pac. 1035. (See Hargrove, supra) The Rowan case dealt with a libelous article wherein the circumstances related cast suspicion upon any one (but only one) of five or six people, all of whom were named in the article. Obviously the law applicable in the Rowan case did not apply precisely to the Hargrove case.

In Fite, Wimmer, and Tulsa Tribune, supra, the problem was *what* was libelous per se and not *who* was libeled. In fact in these cases the plaintiffs were named on the face of the allegedly libelous publications.

In Marland Refining Co., supra, the libelous affidavit referred to a distributor of Marland products who may have been in Sapulpa, Ponca City, or any other place in Oklahoma where Marland Products were being sold. Plaintiff was a distributor in Sapulpa, but not necessarily the one libeled. In the Marland case the court correctly followed the rule from the Montana case as expressed in the Hargrove case.

Fawcett also refers to Owens v. Clark (1931) 154 Okl. 108, 6 P. 2d 755, wherein the court again utilized the rule announced in the Montana case and followed in Hargrove, Fite and Wimmer, supra. It will be observed that the

libelous article in the Owens case dealt with "certain members" of the Oklahoma Supreme Court and not *all* of its members. Without attempting to defend the Owens case we do observe that it is distinguishable from the case now under consideration. In that case the court said:

> "The article was not published about the Supreme Court, *but about certain members* of the Supreme Court * * *." (Emphasis supplied)
>
> * * *
>
> "We are not unmindful of the rule that one who publishes matter about a board or jury or family in its collective capacity assumes the risk of its being libelous."

One obvious distinction between the Owens case and the instant case is that the article by Fawcett in True magazine is levelled at the entire team.

The rule that it is not necessary for plaintiff to be identified by name in the libelous article is lucidly explained in National Ref. Co. v. Benzo Gas Motor Fuel Co., 20 F. 2d 763, 55 A.L.R. 406, wherein it is said:

> "* * * Whether an article is of libelous character per se, and whether it has application to a particular party plaintiff, *are entirely distinct questions*, and should not be confused. The answer to the first question is to be found in the article itself. The answer to the second question is to be found in the proof supporting proper allegations in the complaint. Those proofs may consist of either of the article itself, *or of extrinsic* evidence." (emphasis supplied)

The statement just quoted is in harmony with 12 O.S. 1961, Secs. 303 and 1444, and the better reasoned decisions from this and other courts. See Chapa v. Abernathy, Texas Civil Appeals, 175 S.W. 166; E. I. DuPont De Nemours

& Co. v. Nashville Banner Pub., 12 F. 2d 231; and annotation appearing in 91 A.L.R. at pages 1163, 1169, and 1171.

The additional and final legal argument presented under Fawcett's second proposition is that a defamatory publication concerning a large group is not libelous per se as to an unnamed member of that group. In this connection it appears that the courts have generally held that defamatory words used broadly in respect to a large class or group will not support a libel action by an individual member of the group. 70 A. L. R. 2d 1382. This doctrine appears to stem from the early decision of Sumner v. Buel, 12 Johns 407 (New York 1815), wherein the court concluded that a *civil* action would not lie for a libelous publication against all of the nine officers of three named rifle companies, because of the uncertainty as to who was libeled. In that case the court said:

> "* * * A writing which inveighs against mankind in general, or against a particular order of men, is no libel, nor is it even indictable. It must descend to particulars and individuals, to make it a libel. (3 Salk. 224, 1 Ld. Raym. 486)."

We have examined the cited case, King v. Alme & Nott, as reported in 3 Salk 224 (1700), 91 English Reports 790, and notice that the head notes refer to King v. Orme and Nott as the same Case, reported in Trin. 11 Will. 3, B.R. 1 Ld. Raym. 486, 91 English Reports 1224. In our examination of the case as reported in these two citations it is apparent that it was a criminal case, but moreover it appears from King v. Orme and Nott that the reason why the indictment was set aside was because the jurors were unable from the proof to determine who had been libeled. In that report it was said:

> "An indictment for a libel upon persons to the jurors unknown is insufficient even after verdict. * * * For the jurors did not know the persons who were affected

> by the libel; therefore they could not properly say that the matter was false and scandalous, when they did not know the persons of whom it was spoken; nor could they say that any one was defamed by it."

Thus it is quite apparent that the case is not authority for the proposition that plaintiff in a suit based upon a libelous publication against nine identifiable officers of three named rifle companies could not recover in a libel action. In 34 Columbia Law Review, beginning at page 1332, is a very thorough and studiously prepared article entitled "Liability for Defamation of a Group." In the article it is said of Sumner v. Buel, supra, that "the misinterpretation of a dictum in an early English criminal libel case (King v. Alme, supra) gave rise to the doctrine that because of the absence of specific mention of any person, no action would lie for a statement of this nature."

Sumner v. Buel, supra, is explained in People v. Eastman, 188 N.Y. 478, 81 N.E. 459, in the following language:

> "* * * the charges in the article (Sumner v. Buel) being against a *whole class* no single individual could maintain an action for libel against the author, but not so, however, as regards a criminal prosecution for libel." (emphasis supplied)

Sumner v. Buel did not involve a *whole class* (but only nine officers who were easily identified—see the strong dissenting opinion). Furthermore, that court utilized a criminal case to support its decision in a civil case, but it was observed in People v. Eastman that the civil case of Sumner v. Buel could not be used in support of a criminal case. People v. Eastman was later used by our Court of Criminal Appeals in pointing up a distinction between group libel in civil and criminal cases. Crane v. State, 14 Cr. 30, 166 P. 1110.

From our examination of the authorities we have reached the conclusion that the English courts have never barred recovery in group libel cases unless the group is extremely large. In Ortenberg v. Plamondon et al., Quebec Court of Appeals, 35 Can. Law Times 262, American Annotated Cases, Ann. Cas. 1915 C. Page 347, it was held that a member of the Jewish race in Quebec, consisting of 75 families out of a total city population of 80,000 people, could maintain an action of defamation of the entire group even though he was not assailed individually, but only as a member of the group.

In 23 NRA (NS) 726, the author of the annotation finds a distinction between "Class libel" and "Group libel". He concludes from the cases cited that a member of a "Class" which has been libeled may not maintain an action for libelous matter in derogation of a class. In reference to "Group libel", he concludes:

> "If the defamatory matter is used toward the entire group—that is, includes all of them,—it may generally be said to refer to each, so that each may sue. On the other hand, if the language is used indefinitely or impersonally toward one or a few of several members of a group, any member must establish its application to him in order to maintain his action."

In Anno., 97 A. L. R. 281, the author states:

> "The general rule is that if defamatory language is used towards an entire group, including every one of them, it may be said to refer to each member of the group so that each may sue."

In 36 C.J. Libel and Slander, § 26, it is said:

> "* * * on the other hand if the charge is against a class, and is, or may be, made of definite application, any one of that class may maintain an action upon showing that the words applied especially to him."

While there is substantial precedent from other jurisdictions to the effect that a member of a "large group" may not recover in an individual action for a libelous publication unless he is referred to personally, we have found no substantial reason why size alone should be conclusive. We are not inclined to follow such a rule where, as here, the complaining member of the group is as well known and identified in connection with the group as was the plaintiff in this case. In 31 Columbia Law Review 1322, supra, in considering group libel, it said with good reason:

> "* * * the primary consideration would properly seem to be whether the plaintiff was in fact defamed, although not specifically designated. Considerations adduced in support of the absolute denial of recovery are inconclusive, as against the desirability of providing a remedy for actual injury.
>
> * * *
>
> "A more realistic approach would recognize that even a general derogatory reference to a group does affect the reputation of every member, and would adopt as its test the intensity of the suspicion cast upon the plaintiff."

Measured by the foregoing considerations, and uncontradicted facts in this case, it cannot be successfully contended that the plaintiff was not defamed by the article in question.

We hold, in answer to Fawcett's second proposition, that since the article is libelous on its face without the aid of extrinsic facts to make it so, it is libelous per se; that the article libels every member of the team, including the plaintiff, although he was not specifically named therein; that the average lay reader who was familiar with the team, and its members, would necessarily believe that the regular players, including the plaintiff, were using an amphetamine

spray as set forth in the article; that the article strongly suggests that the use of amphetamine was criminal; and that plaintiff has sufficiently established his identity as one of those libeled by the publication.

In reaching the conclusion that plaintiff has established his identity in the mind of the average lay reader as one of those libeled, we are mindful that a full-back on the alternate squad of a university team who has played in nine out of eleven all victorious games in one season will not be overlooked by those who were familiar with the team, and the contribution made by its regular players. It should be remembered that plaintiff was a constant player, and not a part of the "changing" element of that group.

We conclude that Fawcett's second proposition is without substantial merit.

Fawcett's third proposition is that the article was qualifiedly or conditionally privileged. Our statutory definition of "privileged publication" (12 O.S. 1961, Sec. 1443) refers to the type of privilege commonly called absolute. It is not contended that the publication here comes within that definition. Qualified privilege, however, has broader scope. Definitions of qualified privilege are usually very general in nature and difficult of precise construction. See 53 C.J.S. Libel and Slander, Sec. 89 et seq.; 33 Am. Jur. Libel and Slander, Sec. 126. With regard to privilege generally, it is said that "* * * in order to be shielded * * *on this ground, the communication must be a privileged one uttered on a privileged occasion by a privileged person to one within the privilege"; 53 C.J.S. Libel and Slander, Sec. 87. With regard to qualified, or conditional privilege, it is said in 53 C.J.S. Libel and Slander, Sec. 89, that "It relates more particularly to private interests * * *." An examination of the cases in which the defense of qualified privilege has been held applicable reveals that as a general rule some special private relationship has been involved, such as

fraternal, fiduciary, business, or professional. Such is not the case here. No special relationship is shown, and no privileged person or privileged occasion is shown.

We have examined the cases cited by Fawcett in support of this proposition and do not find them controlling under the facts presented in this case. We hold that the publication dealt with in this case was not a qualifiedly, or conditionally privileged publication.

In Fawcett's fourth proposition it is said that the court erred in excluding competent evidence during the cross-examination of the plaintiff. During cross-examination, counsel for Fawcett inquired if plaintiff had not left the Oklahoma University in 1958 to play professional football in San Francisco. Upon receiving an affirmative answer the further question and proceedings were as follows:

> "Q. Now, at San Francisco on a professional football team that you were with, did you hear people say that they used something?
>
> "A. Yes, sir."
>
> "Mr. Grove (for plaintiff): If the Court please, I think that it is incompetent, irrelevant, and immaterial. What he did at the University of Oklahoma would be material, but some other team I think is immaterial and we object to it. He testified he didn't use it and it is immaterial whether others use it or not."
>
> "The Court: 'I think that is right, that will be sustained."

It is urged in Fawcett's brief that this inquiry was made for the purpose of showing that players on the San Francisco team took stimulants and that plaintiff knowingly played with such team mates, and that such evidence was competent to establish plaintiff's reputation in order to establish what damages, if any, the plaintiff was entitled to receive.

Fawcett did not make an offer of proof and did not make disclosure of the reason for this line of inquiry. The statute, 12 O.S. 1961, Sec. 630, provides that formal exceptions to rulings of the court are not necessary but it does require that a party make known to the Court the action which he desires the Court to take and his grounds therefor. Since this was not done we cannot say that the trial court committed reversible error in sustaining the objection. Garrett v. Lacquemont, Okl., 306 P. 2d 696.

Fawcett's fifth proposition is that "TV, movie and photographic equipment in the courtroom and publicity resulting therefrom deprived defendant of a fair trial." In that connection, the record of the trial proper does not show that such equipment was used during the progress of the trial itself, and the only information in the record before us in that regard is contained in an ex parte affidavit of an attorney for defendant attached to the motion for new trial. It tends to show that such equipment was used during times when the court was in recess, and with the consent and under the supervision of the court. On this showing, we are unable to say that defendant was deprived of a fair trial.

The sixth proposition is that the admission of evidence of the financial worth of defendant prevented defendant from having a fair trial.

It is well settled that in an action wherein punitive damages are proper, evidence of the financial worth of the defendant is competent and admissible. Smith v. Autry, 69 Okl. 28, 169 P. 623. In the petition herein, plaintiff asked for punitive damages, and the evidence was sufficient to support punitive damages if the jury had awarded the same.

Defendant, Fawcett, makes a further argument under this proposition to the general effect that under the cir-

cumstances existing in this case, plaintiff had the burden of proving malice on the part of the defendant; that he did not do so and was therefore not entitled to punitive damages; that the evidence of defendant's financial condition was therefore not admissible. However, under the authorities cited by defendant, this is true only where the publication is privileged. As we have seen, such is not the case here.

Fawcett's last proposition is that the damages awarded here were excessive, and not justified by the law or the evidence.

In this connection, defendant points out that there was no proof of "pecuniary loss", and calls attention to the first sentence of 12 O.S. 1961, Sec. 1446, to the effect that a verdict for plaintiff in a libel action shall never be "• • • less than one hundred dollars and costs, and may be for a greater sum *if the proof justifies the same.*" (Emphasis supplied) Defendant aruges, in effect, that the verdict may not be for more than one hundred dollars unless the proof *of damages* justifies the same. The words "of damages" are not in the statute, and we do not believe they should be read into the statute. To do so would be to limit the meaning of the word "proof" in a manner not apparent from the statute itself, and not contemplated by the Legislature. Such an interpretation would also completely nullify the rule, well established when this section of the statute was enacted, permitting a recovery of general damages for libel per se without actual proof thereof. No legislative intention to that affect appears. We think the term "proof" as used in this section includes any proof on any point properly presented by either party in the presentation of the case. See Kelly v. Roetzel, supra.

On the question of the amount of damages, it is said that "determination of the amount of compensation that should be paid in a particular case is peculiarly a matter for the jury, although if the amount allowed is excessive the court

may interfere"; and that "* * * such factors as the nature of the imputation made, the circumstances surrounding its publication, * * * and the general status and position of the parties, may all be taken into consideration". 33 Am. Jur. Libel and Slander, Sec. 209.

In the instant case, the defamatory publication imputed the commission of a crime—the illegal use of amphetamine; it was made in a magazine of general circulation; the natural result of such publication was to expose the plaintiff to hatred, ridicule and contempt; the plaintiff was a young man whose character and reputation was not questioned, and he was not guilty of the crime charged.

Considering these facts, and in view of the principle that the amount of general damages to be awarded in a libel action is peculiarly within the province of the jury, we are unable to say that the damages awarded here were excessive. 35 A.L.R. 2d 218.

We now consider on behalf of plaintiff his proposition that the trial court erred in directing a verdict for the defendant Mid-Continent, and against the plaintiff. In support of this proposition plaintiff states that Mr. Albro, who was called as a witness for the plaintiff, testified that he was the manager of the Oklahoma City News Agency, a subsidiary of Mid-Continent; that he (Albro) testified that he read a newspaper article published concerning the article "The Pill That Can Kill Sports." Counsel says that the newspaper article referred to was dated February 8, 1958, and that in this newspaper article it was reported that an official at O. U. branded the article (in True Magazine) as wholly untrue. Plaintiff concludes therefrom that "Mid-Continent, through its agent (Albro) had notice of the nature of the article (in True) and of the denial which had been made as to the truthfulness thereof." For the foregoing reason plaintiff argues that Albro, having read the newspaper article prior to the distribution of True

Magazine, it was error to direct a verdict in favor of Mid-Continent.

From our examination of the record we are unable to determine that Albro so testified. He did testify that he believed there was an article in the paper. He then testified:

> "Q. Do you remember reading any article in the paper?
>
> "A. No, I can't say as I do.
>
> "Q. Do you remember any discussion that you might have had with anyone concerning this particular article?
>
> "A. No."

The record does not show, as contended by plaintiff, that Mid-Continent had knowledge of the article prior to its distribution and we are unable to conclude from the argument that the trial court erred in directing a verdict for Mid-Continent.

The judgment in favor of plaintiff and against Fawcett Publications, Inc., is affirmed; and the action of the trial court in sustaining the motion for directed verdict and entering judgment for the defendant, Mid-Continent News Company, is also affirmed.

WILLIAMS, C. J. and WELCH, JOHNSON and IRWIN, JJ., CONCUR.

BLACKBIRD, V.C.J. and DAVISON and BERRY, JJ., CONCUR IN PART & DISSENT IN PART. HALEY, J., DISSENTS.

Filed
In Supreme Court
of Oklahoma
Oct. 16, 1962
. .NDY PAYNE
Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 39485

FAWCETT PUBLICATIONS, INC., *Plaintiff in Error,*

v.

DENNIT MORRIS, *Defendant in Error.*

HALLEY, J. Dissenting:

It is impossible for me to agree with the majority opinion.

Nowhere in the alleged article did it say that the use of amphetamine by the individual player was a crime. Neither did the paragraph in the article where the University of Oklahoma was referred to did it say that amphetamine was given to the players. Here is that paragraph:

> "Speaking of football teams, during the 1958 season, while Oklahoma was increasing its sensational victory streak, several physicians observed Oklahoma players being sprayed in the nostrils with an atomizer, And during a televised game, a close-up showed Oklahome spray jobs to the nation. 'Ten years ago,' Dr. Howe observed acidly, 'when that was done to a horse, the case went to court. Medically, there is no reason for such treatment. If players need therapy, they shouldn't be on the field.' "

There is nothing in the article that is libelous per se as to Dennit Morris. Nowhere does it say that he partook of the amphetamine nor does it say that he would have been violating the law if he had.

In Section 1441 of 12 O. S. 1961, libel is defined as follows:

> "Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends."

To me it is unthinkable that the article in question would expose Dennit Morris to public hatred, contempt, ridicule or obloquy or injure him in any way. He was trained by a highly respected coaching staff. His own evidence showed that he was a professional football player after leaving school and that he received employment with one of the major oil companies of this country.

For this judgment to stand up the article must be libelous "per se" which means by itself, simply as such in its own nature or without reference to its relations, and in connection with libel and slander is applicable to words which are actionable because they of themselves, without anything more, are opprobrious, Tulsa Tribune Co. v. Kight, 174 Okla. 359, 50 P. 2d 350 (1935); Wimmer v. Oklahoma Pub. Co., 151 Okl. 123, P. 2d 671 (1931); Fite v. Oklahoma Pub. Co., 146 Okl. 150, 293 P. 1073 (1931); Hargrove v. Oklahoma Press Pub. Co., 130 Okl. 76, 265 P. 635 (1928).

In Libel and Slander, 53 C. J. S., Section 8, we find this statement:

> "In general, defamatory words may be divided into those that are actionable per se, which on their face and without the aid of extrinsic proof are recognized as injurious, and those that are actionable per quod,

as to which the injurious character appears only in consequence of extrinsic facts."

To me the most that can be made of this article as to Dennit Morris is that it is "libel per quod" and failure of trial court to require plaintiff to plead and prove special damage constituted reversible error. Oklahoma Publishing Co. v. Gray, 138 Okl. 71, 280 P. 419. See also 53 C.J.S., Libel and Slander, Sections 162, 170 and 262.

I dissent.

APPENDIX C

Order of Oklahoma Supreme Court Denying Petition for Rehearing

Filed
In Supreme Court
of Oklahoma
Oct. 16, 1962
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

October 16, 1962

THE CLERK IS HEREBY DIRECTED TO ENTER THE FOLLOWING ORDERS:

39485—Fawcett Publications, Inc. v. Dennit Morris. Application for oral argument and petition for rehearing denied.

W. H. BLACKBIRD,
Acting Chief Justice.

APPENDIX D

Order and Memorandum Opinion of Trial Court Overruling Defendant Fawcett Publications, Inc.'s Special Plea to Jurisdiction

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

No. 145969

DENNIT MORRIS, *Plaintiff*,

v.

FAWCETT PUBLICATIONS, INC., and MIDCONTINENT NEWS COMPANY, a corporation, *Defendants*.

JOURNAL ENTRY OF ORDER

Now on this 15th day of June, 1959, the above entitled cause comes on for hearing before the Court on defendant's motions to quash and the defendant, Fawcett Publications Inc.'s special plea to the jurisdiction of the Court. Plaintiff appearing by Counsel, Robert G. Grove, and the defendants Mid-Continent News Co. and Fawcett Publications Inc., appearing by Counsel, John F. Butler and H. Dale Cook, respectively.

It having been agreed and stipulated by and between the parties hereto and their respective Counsel, and approved by the Court, that the Order of the Court, made in the case of Dodd v. Mid-Continent News Co. and Fawcett Publications, Inc., District Court of Oklahoma County, Case #146031, with respect to defendant's motions to quash and the defendant, Fawcett Publications, Inc's., special plea to the jurisdiction, be made in this cause, and it appearing to the Court that therein the defendant's motions to quash and the defendant, Fawcett Publications, Inc's., special plea to the jurisdiction, were overruled, the Court therefore,

FINDS, ORDERS, ADJUDGES AND DECREES that the defendant, Fawcett Publications, Inc., is "doing business" in the State

of Oklahoma and therefore amenable to the laws of this State; that the defendant's motions to quash and the defendant, Fawcett Publications, Inc's., special plea to the jurisdiction are hereby overruled with exceptions allowed, and the defendants are given ten days from the date this Order is signed to plead further.

Signed this 24 day of June, 1959.

/s/ CLARENCE MILLS
Clarence Mills
District Judge

Mr. Robert Grove, Attorney
Oil and Gas Bldg.
Mr. Dale Cook, Attorney
First National Bldg.
Oklahoma City 2, Oklahoma

Gentlemen: In re: Dodd v. Fawcett Publications, et al (12 cases) District Court
Oklahoma County, Oklahoma.

On special plea to the jurisdiction by defendant Fawcett Publications, who was served with summons in this case by serving the Secretary of State (18-472). Fawcett is a foreign corporation (Delaware), it's home office is in Connecticut, and it has not domesticated in Oklahoma (18-1.200 et seq.) The other defendant Mid-Continent News Company (Delaware) is domesticated, and it's home office is in Oklahoma City.

This is a libel suit. Plaintiff contends that he was libelled in "True Magazine" published by Fawcett and distributed in Oklahoma, that under the facts Fawcett is "doing business" in Oklahoma, and may be sued and served with process as aforesaid. Defendant Fawcett denies these allegations contending that it is not doing business in Okla-

home and therefore is not amenable to the State Courts in Oklahoma by such process.

The oral testimony, the deposition, the contract (Pltf. Ex. 2), and the affidavits have been considered on this issue. No attempt will be made to summarze the evidence. A consideration of all of it in the light of the authorities sustains the conclusion reached.

The contract between the defendants (Plf. Ex. 2) is most enlightening, particularly when considered with the circumstances and the functions, expressed and implied, of the resident agent of Fawcett, Mr. Mead. The contract in effect creates a branch office of Fawcett in Oklahoma, with Mead as a traveling, but resident, supervisor, to report to defendant the facts of the operation of said office, promote business, control the manner of presentation of the magazines to the public, report irregularities, etc. The contract, though calling Mid-Continent, an independent contractor, directs said company as to the distribution to be used by it, controls "sales" and release dates, required records to be kept, and reserves to Fawcett unhampered discretion in the handling of their product by Mid-Continent, and all this in addition to the duties of Mead. (See page 8, deposition of Mead.) (Qui facit per alium facit per se.)

Since the 1945 decision of the Supreme Court in International Shoe Co. v. State of Washington, 326 U.S. 310, 665 ct. 154, the basic principles having to do with this question have been broadened. Our Court follows this opinion: S. Howes v. W. P. Milling Co. (Okla. 1954), 277 P. 2d 655; Superior District Corp'n v. Hargrove (Okla. 1957) 212 P. 2d 893. see: 20 C. J. S. 151 #1920; Note 38 A L R. 2d 742. Also see McGee v. International etc. 355 U.S. 220, 78 S. Ct. 199.

The following are libel or violation of right of privacy, cases, against foreign corporations, wherein process was served on the Secretary of State of the forum.

Clements v. Mac Fadden, 28 Fed. Supp. 274; Laboute v. American Mercury, 96 Atl 2d 200; Jenkins v. Dell Pub. Co., 130 Fed. Supp. 104; Jenkins v. Dell Pub. Co., 132 Fed. Supp. 556; Hunter v. Afro-American, 133 Fed. Supp. 812.

The following cases consider the question, but not in libel cases:

International Shoe Co. Case, 326 U.S. 310; Fielding v. Superior Court, 244 P. 2d 968; Florence Nightingale v. Superior Court, 335 P. 2d 240.

The latest case considered is WSAZ v. Lyons, (1958) 254 Fed. 2d, 242, wherein a television station in West Virginia, in a libel suit, was held to be doing business in Kentucky, and service of process on the Secretary of State of Kentucky was held valid.

In the MacFadden case (28 Fed. Supp. 274 At 276), the Court said:

> "To carry the present line of holdings to any greater extent than they now exist could easily result in a publication two thousand miles away destroying a man's reputation, whether he be great or small and requiring him to come to unfriendly territory, perhaps, to effect his vindication in the courts of justice. For this reason and for others it is manifest that the shipment and circulation of printed documents should hardly be grouped and classed with ordinary articles of merchandise."

This extract has been referred to and quoted in several of the authorities referred to above. It is pertinent to the question.

The plea to the jurisdiction is overruled. Exceptions. Let the order be made under the stipulation in all the cases

as of the date of filing approved Journal entries of order. Defendant to have ten days thereafter to plead further. Any pertinent part of this order deemed advisable may be incorporated in the Journal entries, or in the record.

This matter has been well and ably presented.

Yours very truly,

/s/ CLARENCE M. MILLS
Clarence M. Mills

District Judge

CMM:bm

Attorney for defendant
Mid-Continent News Co.

/s/ JOHN F. BUTLER
John F. Butler

Attorney for defendant
Fawcett Publications, Inc.

/s/ H. DALE COOK
H. Dale Cook

(Endorsements:)
Filed in District Court
Oklahoma County, Okla.
Jun. 24, 1959
DALE SMITH, Court Clerk
By /s/ M. EMERSON
Deputy

APPENDIX E

Wholesale Distributor's Contract Between Fawcett Publications, Inc. and Mid-Continent News Co.

FAWCETT PUBLICATIONS, INC.

WHOLESALE DISTRIBUTOR'S CONTRACT

AGREEMENT between FAWCETT PUBLICATIONS, INC., Greenwich, Connecticut, (Hereinafter called the "Company") and (Name of Wholesaler) Mid-Continent News Company of (City) Oklahoma City (State) Oklahoma trading as Everest News Company at (Street and Number) 1130 North Hudson (Hereinafter called the "Wholesaler".)

In consideration of the mutual covenants herein contained the Company and the Wholesaler hereby mutually agree as follows:

THE COMPANY SHALL:

1. Appoint the above-named Wholesaler as distributor of the magazines and publications distributed by the Company including the following: True Confessions, Motion Picture, Movie Story, True, Today's Woman, Mechanix Illustrated, Startling Detective, Captain Marvel, Adventures, Captain Marvel, Jr., Monte Hale Western, Hopalong Cassidy, Master Comics, Nyoka, Tom Mix, Whiz Comics, True Police Cases, Hit Parade, Outdoors, Detective World, U. S. Camera, Signet Books and Mentor Books, and other matter which may, at the option of the Company, be distributed by the Company under the provision of this contract beginning with the earliest possible time that orders may be filled and continuing thereafter during the term of this agreement in the Territory which may be designated by the Company.

2. Ship copies of magazines, publications and matter to the Wholesaler f.o.b. Wholesaler's place of business or distribution point, except as may be separately designated by the Company, on the terms as shown on the Company's

Official Rate Card to be sent to the Wholesaler periodically, and on which shall appear listings of magazines, publications and other matter the Company decides to distribute.

3. Make out all bills to the Wholesaler at prices fixed by the Company. Any change in the price to retailers or Wholesalers is subject to the discretion of the Company.

THE WHOLESALER SHALL:

4. PROVIDE SUITABLE EQUIPMENT, and a place of business for the receipts, handling and distribution of the magazines, publications and other matter purchased from the Company, which the Company decides to distribute.

5. PLACE A CASH SECURITY OF $ NONE.

(Cash Security Waived in Lieu of Mid-Continent News Company Guarantee) with the Company on which the Company will allow 3% interest per annum except during such period or periods as the wholesaler's current account may be in default or delinquent in payments to the Company. Interest is to be computed semi-annually January 1st and July 1st of each year. If the cash security is not paid in full the interest on so much of the cash security as has been paid is to be credited to the cash security account until it reaches the required amount. When the cash security is paid in full, interest shall be credited to the open or current account. Title to cash security monies passes to the Company; said monies to be considered as partial security for the full settlement of bills sent the Wholesaler by the Company. Further it is agreed that the Company shall at its discretion, when the Wholesaler's account is in the state of delinquency, transfer from the cash security account to the open account any and all monies that may be deemed necessary. The Company also reserves the right to demand that the Wholesaler place additional cash security at such time as the Wholesaler's payment record or billing with the Company deems this action advisable.

6. Sales Dates: Adhere to sales and release dates as are designated by the Company on monthly notices issued to the Wholesaler. These sales and release dates must be strictly adhered to and are subject to change at the Company's discretion.

Provide dealer records that are acceptable to the Company and which clearly indicate all initial distribution, reorders, pickups, returns and net sales.

7. Terms of Payment: Pay the Company on or before the fifteenth of each month for all magazines, publications and other matter, billed the first of the month and covering charges for magazines going on sale up to and including the tenth of the month in question, as per statement to be rendered. No deductions shall be made for returns in transit, or claims for shortages, or for any other purpose. In other words, a statement sent on the first of a given month must be paid in full on the fifteenth of the same month. In the event of payment not reaching the Company's office by the fifteenth of each month, it is understood and agreed that at the Company's discretion the Wholesaler is to accept all future shipments of the Company's magazines, publications and other matter the Company may distribute, on a Cash-on-Delivery basis.

8. Services: Supply and deliver magazines to retailers, including street and car vendors, for resale to the public, on, but not before, the regular publication dates, as provided in the Company's Official Notices which may be substantially changed, altered or amended.

Keep all retailers at all times adequately supplied with the Company's magazines, publications and other matter by re-supplying those who sell out before the next publication date as often as shall be necessary. Extend the distribution of Company's magazines by increasing the sales of old retailers and by adding new retailers. Distribute to retailers advertising, dealers' helps, posters, circulars, and

other material which may be provided by the Company. Cooperate with the Company's plans to increase the sale of its magazines in the Wholesaler's territory. Permit the Company to increase or decrease orders as sales justify, and to enter order for new magazines in such quantities as shall be deemed necessary in the Company's judgment.

9. CHECKUPS: Check all of the Company's magazines, publications and other matter at least as often as designated on the Company's check-up cards. The term "check-up" is understood to mean that it shall be the duty of the Wholesaler to contact 90% of the retail dealers in Wholesaler's territory and take an inventory of their stock. Those dealers who have sold out shall be supplied with additional quantities, and dealers who have a surplus on hand shall be relieved of their excess supplies.

Make complete reports to the Company on the regular Checkup Report Cards, to be furnished by the Company to the Wholesaler, on the dates as shall be designated on said Check-up Report Cards.

Furnish the Company with a complete list of dealers in Wholesaler's territory, showing each dealer's address, line of business, and draw of each of the Company's magazines, publications and other matter, and furnish the Company with corrected list as often as shall be required; and render such other reports as shall be requested by the Company.

10. AUTHORITY: It is expressly understood and agreed that the Wholesaler may represent any number of other publishers in the same capacity, and that the Wholesaler may represent other publishers at the present time, and that the Wholesaler shall act as an independent Contractor for the Company for the purpose herein expressed, and that as such independent contractor he shall have no authority to make any contracts for or on behalf of the Company, or to make any expenditures in its behalf, without the written approval and consent of the Company, nor is the Wholesaler authorized in any manner to sell, transfer,

assign or encumber the cash security placed with the Company according to the terms of Paragraph 5, without first securing written consent from the Company.

11. TERRITORY: This agreement does not entitle the Wholesaler to exclusive territorial rights in the sale of the Company's magazines, publications and other matter, either inside or outside the territory which may be designated by the Company but he may appoint and employ as many of his own agents as he may see fit without supervision or control from the Company; but the Wholesaler shall not supply other wholesale dealers or chain store outlets either within or without Wholesaler's territory, or retail dealers outside Wholesaler's territory, without first securing written consent of the Company.

IT IS HEREBY MUTUALLY AGREED BETWEEN THE PARTIES HERETO AS FOLLOWS:

12. RETURNS: Returns shall be made by Wholesaler sending in upper four inches of front covers, or at the election of the Company entire front covers or whole magazines, charges prepaid, to reach the Company's offices within forty-five (45) days after off-sale dates of magazines. On so called "One-Shots," annual publications, or merchandise items, the full books are to be returned unless otherwise designated by the Company. Failure to comply in making full book returns in such instances as herein noted, or whenever requested by the Company, shall result in rejection of all credit for copies involved. It is understood and agreed that the Company desires, and it is the intention of the Wholesaler, to keep his returns of unsold copies to the minimum necessary to secure maximum sales in the most efficient manner. The Company shall accept from the Wholesaler, subject to United States Government rulings, at the price billed, returns of the unsold copies of each issue of each of the Company's magazines, and publications (and other matter if so designated by the Company), as outlined in notices to the Wholesalers as sent from time to time, which said notices to the Wholesaler are made a part here-

of and by the terms of which the Wholesaler agrees to be bound.

Before allowing credit to dealers on unsold copies, the Wholesaler must recover from the dealers whole copies. The Wholesaler agrees that he will honor such disposal instructions as the Company may elect to give on such unsold copies, and, in the event that no specific instructions are given, he will then cause to have mutilated any and all such unsold copies as to render them unsalable and unusable. Failure on the part of the Wholesaler to mutilate such copies or to dispose of them by a method which actually does prevent such unsold copies from being offered for resale, shall empower the Company to refuse credit to the Wholesaler on such copies, or, if credit has been already given, to void such credit because of the Wholesaler's failure to comply with its rulings, and to take such further action as the Company may deem advisable.

13. TERMINATION OF CONTRACT: Unless sooner terminated or canceled, this agreement shall continue ten (10) years from date hereof and so long thereafter as mutually agreeable. The Company may terminate this agreement with or without notice in case of change of postal rates, strikes, wars, government orders or destruction by the elements or other acts of God, or causes beyond the Company's control that alter present existing conditions of magazine distribution, or for non-payment of bills or unsatisfactory service as Wholesaler for the Company's magazines, or for non-performance of other duties as herein outlined. Both parties to this agreement reserve the absolute right to terminate and cancel this agreement at any time with or without cause by giving ten (10) days written notice by registered mail to the other party at her, his or its last known address, the time of said notice to begin as of the moment of depositing such registered letter in the mails.

14. Upon acceptance of this contract by both the Wholesaler and the Company, it is expressly understood and agreed that the Wholesaler is an independent contractor

for the Company, and, as such independent contractor, assumes all liability, loss or damage, if any, whether physical, moral, legal or otherwise, which may result by or through the carrying out of any or all of the provisions of this contract, whether such liability, loss or damage be caused by or to Wholesaler, its, his or her servants, agents, employees, or equipment, or in any other manner not otherwise mentioned.

15. This contract supersedes all previous contracts or understandings between the parties, and all other contracts are merged in this contract and there are no other agreements or responsibilities existing between the parties (unless they are supplemental contracts in writing, signed by the parties) except as herein expressed. No change in content or wording of this contract shall be made except in writing by duly authorized representatives of the Company.

16. When Valid: The agreement is not binding or valid on the Company unless and until it is accepted by and at the home office of the Company.

In Witness Whereof, the parties hereto have caused these articles of agreement to be signed and sealed this 3rd day of January 1949

Signed, sealed and delivered, in the presence of:

/s/ L. Bushley

As to the Company

/s/ Erma P. Hackett

Witness As to Wholesaler

Fawcett Publications, Inc.

By /s/ Roscoe Fawcett
(Title) Vice-President

Everest News Company
Corporation Trade Name

By /s/ Harvey P. Everest
Address Oklahoma City, Oklahoma

APPENDIX F

Judgment of the Trial Court

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. 145969

DENNIT MORRIS, *Plaintiff*,

v.

FAWCETT PUBLICATIONS, INC., AND MID-CONTINENT NEWS COMPANY, A Corporation, *Defendants*.

JOURNAL ENTRY OF JUDGMENT

Now on this 13th day of June, 1960, the above entitled cause comes on in regular order for jury trial before the undersigned Judge, plaintiff appearing in person and by his attorneys, Robert G. Grove and Leo Winters, and the defendants appearing through their duly authorized representatives and their attorneys, Gus Rinehart and H. Dale Cook of the firm of BUTLER, RINEHART & MORRISON, and the Court having called the case for trial and all parties having announced ready, a jury of twelve (12) persons was duly impaneled and sworn to try the cause.

The plaintiff put on his evidence and rested. Each of the defendants thereupon interposed their separate Demurrers of the said defendants, to which ruling the said defendants duly excepted. The defendant Mid-Continent News Company thereupon put on its evidence and rested. The defendant Fawcett Publications, Inc., offered no evidence and rested. The case was thereupon adjourned until 9:00 o'clock A.M. on the 14th day of June, 1960, at which time the Court called the cause and all parties announced ready to proceed. The defendants then moved the Court to instruct a verdict for the said defendants, which motion was overruled by the Court insofar as Fawcett Publications, Inc. was concerned and exception allowed to the said

defendant, Fawcett Publications, Inc. The Court then sustained the motion of Mid-Continent News Company for a directed verdict, to which ruling the plaintiff duly excepted. The plaintiff then moved the Court for a directed verdict in favor of the plaintiff and against the defendants and the Court thereupon sustained plaintiff's motion for a directed verdict against the defendant Fawcett Publications, Inc., and exception was allowed the said defendant, and the Court overruled the plaintiff's motion for a directed verdict against Mid-Continent News Company, to which plaintiff duly excepted.

The Court thereupon instructed the jury to return a verdict for the plaintiff and against the defendant, Fawcett Publications Inc., and to fix the amount of plaintiff's damages and to return a verdict for the defendant Mid-Continent News Company. After hearing argument of Counsel the jury retired to deliberate and thereafter returned its verdict to the Court which was thereupon read in open Court by the Clerk, to-wit:

> VERDICT—"We, the jury impaneled and sworn in the above entitled cause, do on our oaths find for the plaintiff and fix the amount of his recovery for actual damages only $75,000.00, against the defendant Fawcett Publications, Inc. /s/ MARY SCHULTZ, Foreman"

The Court thereupon asked the members of the jury if that was their verdict, to which each member answered affirmatively. The foreman of the jury then, in open Court, signed the verdict finding for the defendant Mid-Continent News Company, to-wit:

> VERDICT—"We, the jury impaneled and sworn in the above entitled cause, do on our oaths find for the defendant Mid-Continent News Company. /s/ MARY SCHULTZ, Foreman".

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff have judgment against the defendant Fawcett Publications, Inc., for Seventy-Five-Thousand Dollars ($75,000.00), with interest at the rate of six percent (6%) per annum from the date hereof until paid and for his costs, for all of which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the defendant Mid-Continent News Company have judgment against the plaintiff.

/s/ CLARENCE MILLS
Clarence Mills
Judge of the District Court

Simply by using a phony letterhead, the author purchased by mail enough drugs to hop up over 100 football teams.



You can go to jail for selling amphetamine to a truck driver or injecting it into a racehorse, yet this same drug is being handed out to high school and college athletes all over the country

A SHOCKING REPORT:

The PILL that can KILL SPORTS

By NEAL WILKINSON Illustrated by WILLARD MULLIN

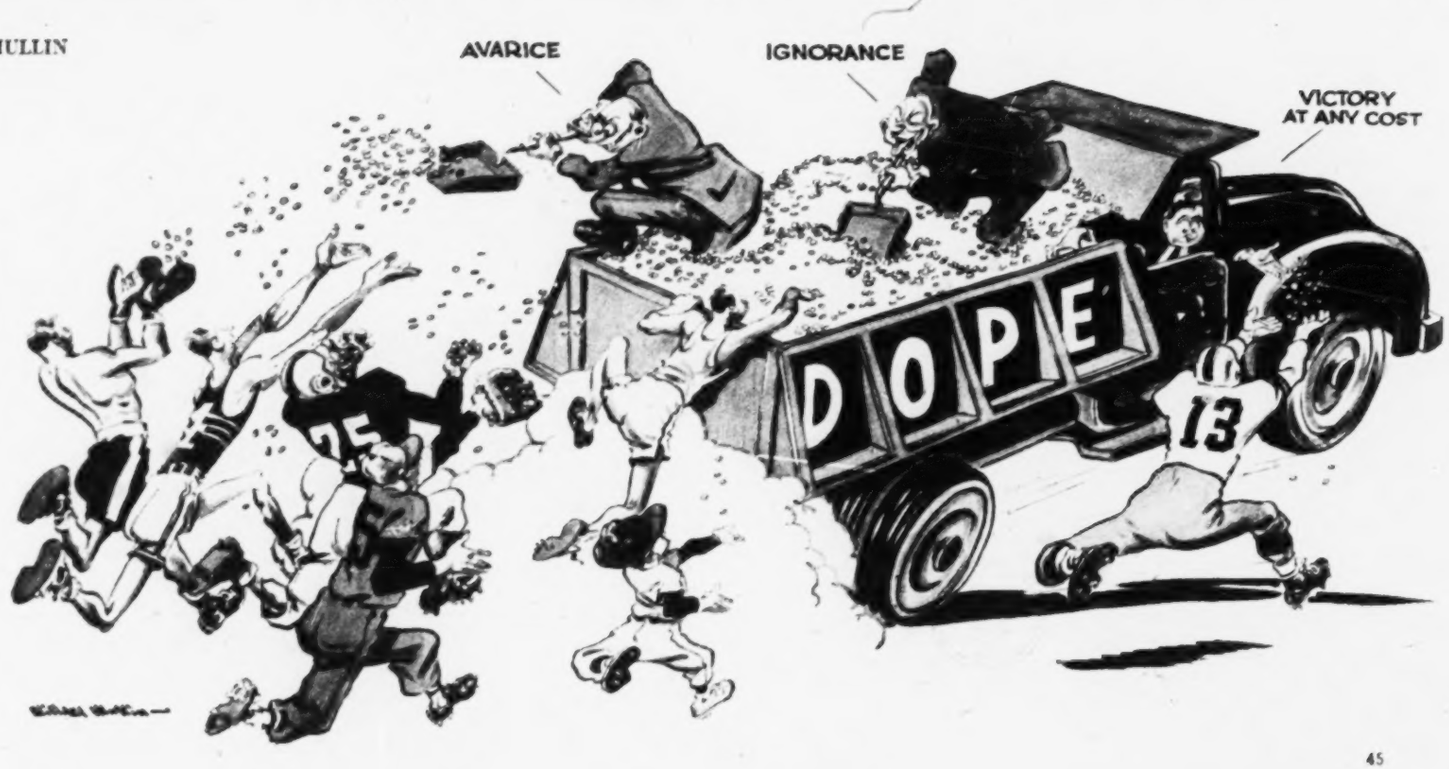
When Jim Dilgard, a high school basketball star from Ashland, Ohio, suffered a nervous breakdown just after entering Ohio Wesleyan University in October 1954, the best kept secret in sports suddenly became a bomb which threatened to destroy the entire empire of amateur athletics. While doctors studied the mysterious breakdown, Jim's frantic father remembered a drug that Clovis Taylor, the high school coach, had passed out to key players.

The drug was amphetamine, a powerful stimulant which affects the heart and nervous system, and Dilgard's father realized at once that it was behind his son's collapse. The drug most commonly used to dope horses, amphetamine is illegal at any track in the world, according to the International Association of Official Racing Chemists. But a high school kid had been doped with this same drug.

When Jim Dilgard's father told his story to Richard Bear, president of the Ashland Board of Education, he lit a long fuse which exploded the bomb nearly three years later, June 5, 1957, in the House of Delegates of the American Medical Association. After hearing evidence about how athletic doping had spread into high schools, this ultra-conservative organization blasted such conduct as a "shocking picture" of a "vicious practice!"

Which put sports leaders on the spot. They knew athletes were using amphetamine. Yet to admit that one record holder had been doped would be admitting that *one* apple in their barrel was rotten, and would threaten the whole barrel.

The Official Rules and Regulations, Track & Field Events, Amateur Athletic Union states in its Rule XVIII: "Doping is defined as the use of any stimulant not normally employed to increase



the power of action in athletic competition. . ."

Neither Dan Ferris, secretary-treasurer of the AAU, nor J. Lyman Bingham, executive director of the U.S. Olympic Association, knows which drugs, "if any," come under this rule. "We have no proof," Bingham said, "that amphetamine will increase the 'power of action.'" In addition, Dr. James B. Wolffe, president of the American College of Sports Medicine—an organization composed of coaches, trainers, and team physicians—followed the same line, saying that the ACSM didn't know of "any controlled experiments" which proved that amphetamine aided an athlete's performance.

This may or may not come as news to those distinguished gentlemen, but controlled experiments *have* been made, and the results of these experiments are in the files of TRUE Magazine. They are also held by John T. McGovern, the official legal representative of the U.S. Olympic Association. And the experiments prove exactly what you would expect them to.

They were made after a horse doping charge, when the Jockey Club called in the late Dr. Hubert S. Howe, chairman of the New York Academy of Medicine's committee on narcotics and drugs, and asked him to discover, by scientific experiments, whether or not the sympathomimetic amines (a large family of stimulant drugs, including ephedrine and amphetamine) improved running speed.

Do amphetamines increase athletic prowess? Dr. Howe, a careful, scientific man, determined to set up tests which would settle this question once and for all. To eliminate the many factors of chance, such as would be found in an actual race, he devised a simple yet graphic test where rate was kept constant and distance was measured.



Racehorses are scrupulously guarded against doping violations, yet the same drugs are given freely to young athletes.



Two healthy male volunteers were selected. Both were given a dummy dose of 1 cc. of normal saline solution in each nostril. (This would, of course, have no effect on their performance, but Dr. Howe did not want them to know when he was actually giving them the drug.) Then, from a normal erect position, they were instructed to elevate themselves on their toes, full height, and return to normal, at the approximate rate of once each second—on command. The performances were to be observed, monitored, timed and recorded, under medical supervision and scientific checks.

One volunteer was able to perform the exercise for 8 minutes and 27 seconds before being stopped by exhaustion. He did 482 elevations. The other continued for 7 minutes, 33 seconds, and performed 448 elevations.

After a short rest, both were completely recovered and received 1 cc of 5% ephedrine instead of the plain saline solution and repeated their performances. "When I first started," the first participant later recorded, "my legs started to get very sore, especially the muscles in my lower legs. The pain left me, however, after a few minutes and I continued the exercise. I went on lifting myself on my toes until, shortly before I stopped, I began to feel the muscles in my lower legs. . . . I was not exhausted, did not feel weak, and could have gone on with the exercise easily if it had not been for the pain in my legs." He had kept going steadily for 24 minutes and 28 seconds—*nearly three times the non-stimulated time*—and had done 1,319 elevations.

The other participant continued 22 minutes and 32 seconds and registered 1,302 elevations—also about triple his normal performance. And this second test was performed after the men had already gone through the test once, and had stopped the first time because of exhaustion.

Dr. Howe told me 10 years later, when he decided to release his tests to the public, that such abnormal, artificial feats were extremely dangerous. "Even with the closest medical supervision," he said, "some temporary damage is inevitable."

Both young men reported on the after-effects. One said he felt perfectly normal the first day after the experiment, but: "The following morning, 27 January (1946), when I proceeded to get out of bed, I found that I could not stand on my legs straight up. When I first tried it, I received an extremely sharp pain in the muscles of both lower legs. I found that I was all right in sitting or even standing with my legs bent, but the moment I tried to straighten my legs I felt the pain. I had great difficulty in walking and spent most of the day sitting down. I proceeded to apply heat to my leg muscles, but found out also that I



When Dilgard's father told the president of the Ashland Board of Education that basketball coach Cloyce Taylor had been giving drugs to his players, the school board confronted Taylor with the charge. "That's right," the coach admitted. "I pepped them up so that they could play better." Besides Dilgard, he had given drugs to two other basketball stars during the 1953-54 season—a player named Larry Brewer, and All-Ohio center Ken Sidle.

When questioned further, Taylor said he had not pepped up the whole team. "Just a few key players who needed the lift. And I told them not to talk about it around the other kids."

Taylor (157 wins, 33 losses) added, "It's common coaching practice." No, he couldn't tell when and where a particular coach gave what drug to which player. "But everyone knows about it. Ask Dr. Meuser."

Dr. C. B. Meuser, the county's health commissioner and an athlete himself, denied prescribing amphetamine for "general use" by Taylor's athletes, but admitted giving the drug to the coach. He defended both Taylor and the athletic use of amphetamine. "I've been taking it for years," Dr. Meuser said. "It helped my [Continued on page 101]

was unable to massage the leg muscles to any great extent since the mere touch on the inside portion of the lower leg muscles brought great pain . . . 28 and 29 January, I walked somewhat and found that the pain subsided slowly. . . . Today, 30 January, there is almost no pain in walking but I still feel soreness by touching or pressing . . ." The other's report was similar. Five full days after the test, his legs still hurt.

Dr. Howe flatly refused to perform the same tests on runners, stating that such a test "Could cause breakdown, permanent damage to the heart, or death."

The Nazis, though, during the war, tested amphetamine on the running ability of young German athletes. They used methamphetamine, and found that it greatly improved performance. In fact, the improvement was reported to be between 200 and 300%! The drug was issued to selected troops under the name pervitin, but the actual tests were halted on official order. The cost was too great in terms of physical damage to Hitler's youth.

These controlled experiments by German researchers may be found in the medical study, *War Medicine*, a standard text. In addition, the famed *Carnegie Report on American College Athletics* tells of college coaches using strychnine and cocaine to improve athletic performances over 30 years ago.

Since then, only three things have changed: 1) Better drugs are available; 2) The practice has become an "open secret" and has spread through most major sports; and 3) The age bracket has been dropped—to high school kids.

Following his tragic collapse, basketball star Jim Dilgard was rushed to the Cuyahoga Falls Receiving Hospital, and remained under hospitalization for three months before returning to school. He is through with athletics.





Olympic legal aid McGovern calls present widespread use of drugs "menace to nation."

Dr. Berger (top right) shocked the AMA with author's report on drug usage.



Accused of doping high school boys, coach Taylor (shown at right) said: "It's common coaching practice."

The Pill That Can Kill Sports

[Continued from page 47]

tennis." As a bowler, Dr. Meuser said that he had "pepped myself up" with the drug when he competed at the American Bowling Congress Tournament in Detroit.

Taylor's players said the drug made them feel "sharp," gave them a "high pitched" feeling. "I started giving Benzedrine (amphetamine sulphate) to key players before important games eight years ago," Taylor told me. "Then I switched to Dexedrine (dextro-amphetamine sulphate) when it came out. They are both harmless drugs."

After the AMA blasted such use of amphetamine as "shocking" and "vicious" I flew back to Ashland and asked coach Taylor about his "harmless" drugs.

"If this drug is so dangerous," Taylor asked me, "why didn't they tell us before? What about the team physicians who leave it in the dressing rooms so players can help themselves?" Cloyce Taylor is an honest man—and one of the few who will talk openly and tell the whole truth.

For example, when Lou Little was Columbia University's revered football coach, acknowledged dean of "low pressure" athletics, ... chairman of the Football Rules Committee, I told him how doping had spread. Hadn't doping gone too far when they started hopping up high school kids? Little brushed me off: "Don't tell me about it. I don't want to know."

Definite proof that doping was a common practice came on September 13, 1956, when I received this report from the USOA's attorney, John T. McGovern. "I have communicated with record executives of Olympic, university, A.A.U. organizations, athletic directors and others. . . At every point of contact I was informed . . . that substantially the entire population in schools and colleges have been using this type drug. . ."

McGovern's report on the results of his private survey of amphetamine usage was written on official Olympic Committee stationery, and the three top names on the letterhead are Dwight D. Eisenhower, John Foster Dulles and Charles E. Wilson.

What is amphetamine? Chemically, it is phenyliso-propylamine, one of a group of stimulating drugs known as sympathomimetic agents. George P. Larrick, commissioner of the Food and Drug Administration, says: "Amphetamine has a wide stimulating activity, producing elevated blood pressure, constricting peripheral blood vessels, stimulating heart muscle and, in addition and particularly, stimulating the central nervous system of man.

"This is marked by wakefulness and alertness; increased initiative and elevation of mood; enhanced confidence, euphoria and elation; lessened sense of fatigue, and increased motor activity."

World War II heightened interest in drugs that stimulated heart and nervous systems, giving users abnormal strength and courage. The Allies used benzedrine, the Nazis pirvitin, the Japanese, philopon and hiropon. Such stimulants supported suicide stands, went into the kits of men on daring missions. What if there were some dangers from the drug itself? Death was often the only alternative. With war's end, the drugs of battle moved on to the playing fields.

The amphetamines are administered to athletes by hypodermic injection, nasal spray, or in tablets or capsules, but pills are the most common form, at least according to those athletic figures who are willing to talk.

Bruno Banducci, whose professional football career was with the San Francisco Forty-Niners and the Toronto Argonauts, said that the pills are called "bennies" by the players and are used extensively. "Each of us usually took three to the game—two before kick-off and one between halves." Tom Dublinski (Detroit Lions and Toronto) confirmed Banducci's statement about the extent of the practice but said that he hadn't taken any, himself, as a professional—though he had tried a "benny" while quarterback at the University of Detroit.

Chuck Mather, football coach at the University of Kansas, agreed with Dublinski's view. "Leaving morals out of it—and I think that's the worst thing a coach *can* do—I don't like the stuff. It makes the players too jumpy, hard to control. They use them a lot in pro ball but the pros play a different game. In college, it's used more in basketball and track."

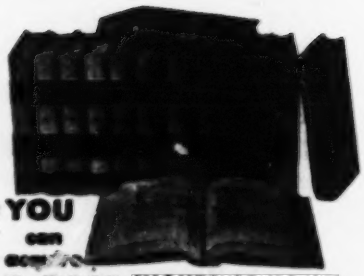
Drugs are also used by professional baseball players. Reno Bertoia, who started the season at third base for the Detroit Tigers, was nervous and fumbling in spring training. Then he started taking tranquilizers and his batting average shot up from his last season's mark of .182 to nearly .400.

The Detroit *Free Press*, on May 14, 1957, broke the story as follows: "PASS THE 'HAPPY PILLS'—LOOK WHAT THEY DID FOR BERTOIA!" The story began: "Another miracle of modern medicine! That's the story behind the sensational performance of Reno Bertoia." Tiger manager Jack Tighe chimed in by hailing Reno's performance as: "proof of another contribution by medicine to baseball."

The reaction of the rest of the baseball world, however, was not quite so enthusiastic. The Tigers' got another physician, and the new doctor announced that, as far as he personally was concerned, Reno would have to get along without the tranquilizing drugs. [By the end of the season Bertoia's average had slumped to .275, and he was no longer playing regularly.]

The public outcry against the Bertoia story shows what results can be obtained when the truth is published. In most other cases, sports editors have chosen to play down stories involving drugs and athletics, or else dismiss the drugs as "harmless."

Frank Wiechec, trainer for the Philadelphia Phillies, also discussed medicine's contribution to baseball, but not with enthusiasm. He admitted that: "many professional athletes resort to anything



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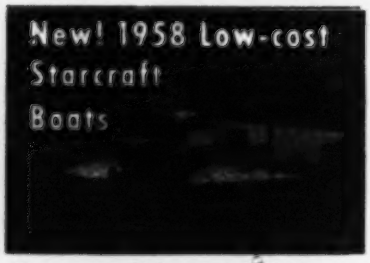
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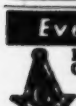
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that may provide them with a crutch and a method of better performance." All big-league ball players don't get that surge of power from crunchy breakfast food. Wiechec stated flatly that some took pep drugs.

Dr. Fred Davies, Ottawa Rough Riders' physician, said that players on all major Canadian football teams used "bennies." The pills—which were obtained on a doctor's prescription—"were made available in the dressing rooms to those who wanted them."

But they were only dished out because there was a demand for them. "Many players," Dr. Davies told the Associated Press, "had learned to use them in U.S. colleges."

Two years before this statement, a former New York Football Giant, promised anonymity in return for candor, gave TRUE a written statement: "I've played on four pro clubs. They all use amphetamine. Not every player, but most of them. . . I got my first benny in the Big Seven, right after the war. The trainer passed them out about 15 minutes before kick-off.

"The young kids didn't get bennies then. Just us returned vets. But that has all changed. The colleges are getting more professional all the time."

"After turning pro, I started getting it in the arm," the former Giant continued. "It's still the same old benny but the needle works better. Five of us on one club got it that way."

Amphetamine has not only permeated college and professional athletics, and penetrated high schools, but has even invaded sedentary sports. George Rapee, one of the world's greatest bridge players, admits that he is a pill player. "An Equanil and two dexies (10 milligrams of dextro-amphetamine) and I'm ready to swing," he told a bridge reporter. "Deal the cards. I can play all night!"

This craze for pills was most shocking at the recent Olympic Games. In Olympic Village, the athletes' rooms looked like small drug stores. Vials, bottles and pill boxes lined the shelves. Shotputter Ken Bantam admitted that he tried every pill he could find because "I don't want to miss anything." Half miler Lon Spurrier was reported to have taken "fifty pills a day."

Neville Scott, a New Zealand athlete who was surrounded by these huge drug supplies, watched pills gulped like popcorn and listened to athletes worry about what the other took. Then he issued this understatement: "It seemed certain some Olympic athletes were taking drugs."

Judy Joy Davies, Australian swimming star, said: "Some of our champion swimmers fearlessly admit they take pep pills to help them shatter records." Backstroke champion David Tyler is one of these, according to Prof. Thomas K. Cureton, director of the University of Illinois' physical fitness laboratory. But Professor Cureton didn't have to go to Australia to find amphetamine. There is plenty right at the University of Illinois.

Over 6,000,000,000 doses of amphetamine are taken each year in the United States. Next to aspirin, it is the largest selling drug in the country. Commissioner Larrick, who is responsible for policing the amphetamines, told me that it was impossible to estimate our present consumption. The 1953-54 average was six billion doses. That figure was obtained by a subcommittee of the Senate Judiciary Committee, which found that in the four years between 1950 and 1954 production increased over 400 percent.

The current figures cannot be obtained for a number of reasons. First, the companies which manufacture the drugs are reluctant to disclose any statistics. Secondly, dozens of firms are "counterfeiting" the patented drugs, making pills which look just like the recognized drugs, and no figures are available on these.

There is, however, one statistic which *is* available, and which strongly indicates that consumption is rapidly increasing. Recently I was able to buy 30 cc.'s of dextro-amphetamine sulphate for only 95 cents. This amount—enough to hop up an entire football team—cost three times this much a few years ago. Also, I was able to buy a thousand amphetamine pills for $1.40, less than a third of the 1954 price. When sales go up, prices go down.

Speaking of football teams, during the 1956 season, while Oklahoma was increasing its sensational victory streak, several physicians observed Oklahoma players being sprayed in the nostrils with an atomizer. And during a televised game, a close-up showed Oklahoma spray jobs to the nation. "Ten years ago," Dr. Howe observed acidly, "when that was done to a horse, the case went to court. Medically, there is no reason for such treatment. If players need therapy, they shouldn't be on the field."

According to Dr. Herbert Berger, the president of the Medical Society of the City of New York and chairman of the New York State Committee on Narcotics and Alcohol, doping has become widespread in the fight racket. (Dr. Berger, incidentally, is the man who finally blew the whistle on the whole subject of narcotics in athletics. His report to the American Medical Association brought the story out into the open, and caused the recent headlines.)

Dr. Berger has done much probing into the use of heroin among prizefighters. Heroin, because of its pain-killing qualities, is particularly appreciated by those who take punishment for a living, and he found its use to be widespread. Keeny Teran, former North American flyweight champion, and Jesse Flores, a middleweight contender before Rocky Graziano dismembered him, are two fighters who took heroin.

Another heroin user, interviewed in San Quentin, told the investigators that he had started on drugs when he was a fighter. "It's general among young athletes," he said. Drugs are now becoming so common in the fight business that the Bureau of Narcotics Enforcement, of the California attorney general's office, perfected a new detection technique: a urine test, which is extremely accurate. Use of this test could be very helpful, if adopted by other athletic officials. As BNE Inspector Fred L. Braunmoeller told a senate subcommittee: "This test could prove invaluable in the field of boxing and perhaps other allied sports."

But does anybody want a test? No, they don't. Like Lou Little, they "don't want to know."

In July 1956, I spent a week with Dr. Forrest C. (Phog) Allen, the recently retired Kansas basketball coach and a sports figure for 50 years, and asked him about the history of drugs in sports. "Nobody likes to talk about doping," Phog told me. "It's too hot. But it has been going on for a long, long time." Phog said that athletic drug usage always follows wars, and told of service players during World War I who got narcotics from the medics to soup up their play. "In 1919, one of my players, a returned vet, was on the stuff and wanted me to fix him up."

A senate judiciary subcommittee, Estes Kefauver, chairman, had been investigating amphetamine abuses in non-athletic fields, and on March 24, 1956, TRUE received a letter, saying in part: "We, on the Subcommittee to Investigate Juvenile Delinquency, are certainly most interested in your findings regarding the use of amphetamines by youth, and especially the use by coaches to dope their players." When Dr. Allen and I got together I showed him this letter and he began confessing the sins of others.

Amphetamine, Allen said, wasn't used much before the end of World War II. "The word just never got around." Before that, strychnine was the favorite "pep-up pill." And before that, cocaine. Both drugs were once considered harmless and were available without a prescription. They were widely used by women as beauty aids, as well as by their contemporary campus heroes. Strychnine made the eyes shine; made the feminine user vivacious. Cocaine was included in soft drinks; acting as an appetite depressant, it helped girls keep their slim figures, and also opened stuffy noses. Now, of course, amphetamine performs these civilized necessities much better, whether in scrimmage line, beauty salon or hospital.

Both earlier drugs had distinct athletic drawbacks. Strychnine's effect was too short lived, couldn't last through an entire football game, and it was too highly toxic to give "boosters" between halves. Cocaine, an imported drug, was too closely guarded by Treasury agents.

Amphetamine is, for all practical purposes, domestic cocaine. Both drugs belong to the same medical family; their pharmacological effects are alike, and they have identical dangers, both to the individual and to society. The stimulant drugs are not so rapidly addicting as opiates and depressants, but have always been feared the most by police officers. Dr. Eugene F. Carey, surgeon, Chicago Police Department, grew up between the red light district and the slaughter yards, knew drugs as a kid, and covered the same 50 years of drugs-in-crime that Phog Allen did for drugs-in-sports before the senate judiciary subcommittee investigating narcotics.

Dr. Carey testified: "As time changes, the drugs are changing. Morphine is losing to heroin and the barbiturates. Amphetamines are apparently gradually shelving cocaine aside. . . Now, since am-

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phetamines are on the way to supplant cocaine, we find that these users also have no use for 'chick makeups' of any kind. (Chick makeups are minor, non-aggressive crimes such as shoplifting, picking pockets, petty larceny, etc.) The 'lifter' (amphetamine user) can and does become heroic, boisterous, pugnacious, or vicious. . ."

These results are what make amphetamines useful in the field of athletics. They promote aggression, increase the competitive spirit, and work the same as the epinephrine (adrenalin) produced in your body. The adrenal cortex, however, is wiser than victory-hungry coaches and athletes, and Dr. Gordon A. Granger, chief of the Drug Branch, FDA, gave some dangers of drug abuse. "There is always the danger of taking the amount that will be acutely toxic and produce confusion, delirium panic states, or the awakenings of latent urges toward assaultiveness, suicide or homicide."

Carl Austin Hall, the brutal kidnap-murderer of little Bobby Greenlease, is perhaps the most widely publicized user of amphetamine. Hall, in his death cell, signed a statement for FDA and FBI agents that he "took amphetamine to gather the courage to kidnap the child first, and then to commit the murder."

Commissioner Larrick says that FDA files contain many cases showing the amphetamine-crime link: ranging from "Anchorage, Alaska, to Miami, Florida."

The Washington, D. C., narcotics squad says that amphetamine: "is as dangerous and debilitating to the user as opium and its derivatives (heroin and morphine)."

John T. McGovern supported this by telling me: "I have examined the records of actual trials in court which indicate that administration of this drug has been the cause of many crimes including rape, murder and abduction."

Here are a few actual cases from FDA files: A truck driver, pushing himself on a long haul with the pills (truckers call them "co-pilots") took a heavy overdose at a truck stop, washed it down with coffee, and ran amok with a knife. A juvenile gang in New Orleans got "hopped up," terrorized the neighborhood by sadistic actions, beat up a 15-year-old girl and left her with a fractured skull. Another 15-year-old girl was raped in southwestern Missouri by an amphetamine addict; still another 15-year-old was found dead in her bed from amphetamine. Subsequent investigation revealed that she had gone to a wild "pill party" the night before where another man was killed when he either jumped or was pushed from the window.

President Eisenhower, on November 27, 1954, instructed Secretaries Dulles, Wilson, Folsom, Humphrey, and Attorney General Brownell to prepare a report on the nation's drug problem, noting that: "I know that devoted and strenuous attention is being given this problem on a number of fronts."

The *Report of the Interdepartmental Committee on Narcotics* to the President was submitted February 1, 1956. Section 14 said: "The committee has noted striking similarities between the individual and social problems raised by the abuse of (heroin, morphine, cocaine) and such substances as marihuana, the barbiturates, amphetamines, and others which affect emotional behavior."

The U. S. Public Health Service, the World Health Organization of the United Nations, and the Food and Drug Administration, classify amphetamine as addicting. Congressional committees have spent large sums chasing about the country, investigating the "amphetamine menace."

The Department of Justice has even got into the act. On October 25, 1955, United States attorneys in 10 federal districts and six states simultaneously filed 22 criminal actions against 42 individual defendants. All of these criminals were subsequently tried, convicted and sentenced in federal courts. Their crime? *They had sold amphetamine to truck drivers.*

John T. McGovern, of the U. S. Olympic Association, says that substantially the *entire new athletic generation* is using this drug! And still nothing is being done. A druggist can sell pills to a sleepy trucker and get one to three years in a federal clink, plus $1,000-$10,000 fine. And yet when a high school coach uses amphetamines to pep up kids to play better, and the story is told across the nation by the Associated Press and the United Press, it doesn't even arouse a whisper of protest from any of our leaders who express such concern over *non athletic* abuse of drugs! "Protect the delicate truck driver and guard our fragile criminals," seems to be the national attitude.

This attitude is not shared by Harry J. Anslinger, famed chief of the Federal Narcotics Bureau, who has publicly blasted the use of amphetamines to get more "drive" from the body. "That kind of speed," he says, "can lead only to crack up."

However, while Mr. Anslinger is a leading expert on narcotics, he is not working the athletic beat. And there, the official attitude is either to ignore the drugs completely, or to play them down as harmless. What are they afraid of?

Well, one thing that terrifies them is the complete upsetting of all official records which would result if it was revealed that modern record holders accomplished their feats while under the influence of narcotics. For another, they fear that it might wreck public confidence in all organized athletics. In my opinion, this "head in the sand" attitude will damage athletics far more seriously than would a public airing of the truth, and the beginning of positive steps to correct this spreading evil.

And there is another powerful reason behind this attempt to suppress any mention of drugs. Each coach, each college president, each team owner wants to win. Col. Harry Henshel of the Olympic Basketball Committee illuminated this fact when he said: "Doping is the logical result of scientific advances in an atmosphere of moral decline. Instead of proselyting youngsters, teaching them to lie and accept graft, the victory-at-any-price boys have simply found another gimmick."—Neal Wilkinson

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 57

FAWCETT PUBLICATIONS, INC.,
Appellant,

VERSUS

DENNIT MORRIS,
Appellee.

Appeal from the Supreme Court of the State of Oklahoma

MOTION TO DISMISS APPEAL AND SUPPORTING BRIEF

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In the
Supreme Court of the United States
OCTOBER TERM, 1962

No. 741

FAWCETT PUBLICATIONS, INC.,
Appellant,

VERSUS

DENNIT MORRIS,
Appellee.

Appeal from the Supreme Court of the State of Oklahoma

MOTION TO DISMISS APPEAL AND SUPPORTING BRIEF

MOTION TO DISMISS

Appellee in the above entitled case moves to dismiss on the grounds that the appeal: (1) does not present a substantial federal question; (2) that the federal question sought to be reviewed was not timely or properly raised; (3) and that the judgment of the lower court rests on an adequate non-federal basis, all of which is more specifically set out in the accompanying brief.

BRIEF

A. PRELIMINARY STATEMENT

Inasmuch as appellant's Questions 2, 3 and 4[1] presented, do not draw into question the validity of any Oklahoma statute on the ground that it is repugnant to the Constitution, treaties or laws of the United States and therefore not proper questions to be considered on appeal under 28 U.S.C. 1257 (2), this brief will be devoted to Question 1 only.

B. STATEMENT OF THE CASE

After service of summons was had on appellant pursuant to the appropriate Oklahoma jurisdictional statutes,[2] appellant filed a special appearance, plea of no jurisdiction and motion to quash (R. 12, 13). There was no allegation in appellant's special plea that the Oklahoma jurisdictional statutes, *supra*, had been unconstitutionally applied, but only that the Oklahoma Court was improperly exercising *in personam* jurisdiction over appellant (R. 12, 13). The journal entry of order made by the trial court overruling appellant's special plea to the jurisdiction and motion to quash made a finding that appellant was "doing business" in the State of Oklahoma and therefore amenable to the laws of the State. No finding or ruling with regard to whether or not the jurisdictional statutes, *supra*, were repugnant to the Constitution of the United States was made (R. 51, 52).

---

[1] Appellant's Jurisdictional Statement, 3.

[2] Title 18, Okla. Stat., Sec. 1.17, and 472 Laws of 1961.

When appellant filed its petition in error in the Supreme Court of Oklahoma, appellant did not raise the question as to whether or not the Oklahoma jurisdictional statutes, *supra*, were being unconstitutionally applied, but only set forth that the trial court erred in overruling appellant's special appearance and motion to quash.[3]

When the Supreme Court of the State of Oklahoma considered appellant's appeal from the trial court, the court took particular note of the fact that appellant had not raised a question of due process under the Fourteenth Amendment to the Constitution of the United States.[4]

The first attempt that appellant made to challenge the application of the Oklahoma jurisdictional statutes, *supra*, on the grounds of their being unconstitutionally applied, was in appellant's petition for rehearing and accompanying brief.

1. The appeal does not present a substantial question.

It is essential to the jurisdiction of the Supreme Court under 28 U.S.C., § 1257(2) that a substantial question be properly raised in the state court proceedings. If the question is frivolous or has been foreclosed by a prior decision of the Supreme Court, it is not to be deemed a "substantial" federal question. *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308; *Zucht* v. *King*, 260 U.S. 174; *Palmer Oil Corporation* v. *Amerada Corporation*, 343 U.S. 390.

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[3] See paragraphs 8 and 20 of appellant's Petition in Error to the Supreme Court of Oklahoma.

[4] *Fawcett Publications Inc.* v. *Morris*, 377 P.2d 45; Jurisdictional Statement, 7a, 8a.

Appellant raised no federal question in the courts below, and the Supreme Court of Oklahoma based its opinion on state law; therefore, no substantial federal question is presented. *Black* v. *Cutter Laboratories*, 351 U.S. 292.

2. The Federal Question sought to be reviewed was not timely or properly raised.

Under 28 U.S.C., § 1257(2), insofar as the case at bar is concerned, the Oklahoma jurisdictional statutes, *supra*, must have drawn into issue in the trial court and the statutes held valid as against the attack of appellant herein that they were repugnant to a constitutional guaranty, inasmuch as the Oklahoma Supreme Court has said that it will not consider the constitutionality of a statute raised for the first time on appeal. *Mo., Kan., and Tex. R. Company* v. *Prince*, 133 Okla. 228, 271 Pac. 253; *Garman* v. *Myers*, 183 Okla. 141, 80 P.2d 624; *First National Bank of Alex* v. *Southland Production Company*, 189 Okla. 9, 112 P.2d 1087; *Springfield Fire and Marine Insurance Company* v. *Biggs*, 295 P.2d 790; *Birmingham Fire Insurance Company* v. *Bond*, 301 P.2d 361; *Simons* v. *Brashears Transfer and Storage*, 344 P.2d 1107.

Although appellant objected to the jurisdiction of the Oklahoma court from the time summons was served, appellant never contended that the jurisdictional statutes, *supra*, had been unconstitutionally applied. The first attempt to raise the question by appellant was in its petition for rehearing before the Supreme Court of the State of Oklahoma. Appellant's petition for rehearing was dismissed by the court without an opinion. This being true, there

was not a "substantial" federal question raised nor is there one present at this time for consideration by this Court. *Hanson* v. *Denckla*, 357 U.S. 235; *Wilson* v. *Cook*, 327 U.S. 474; *Black* v. *Cutter Laboratories, supra.*

The rules to be applied as to whether or not a federal question has been properly raised in the state court are rules promulgated by the legislative bodies and appellate courts of the respective states. *Cramp* v. *Board of Public Instruction*, 368 U.S. 278. Appellant's contention throughout the case, commencing in the trial court and continuing through the Supreme Court of the State of Oklahoma was that it was not "doing business" within the State of Oklahoma and therefore not amenable to the Oklahoma jurisdictional statutes, *supra*. The jurisdiction of the Supreme Court of the United States would in this case depend upon appellant's having attacked the constitutionality of the Oklahoma jurisdictional statutes, *supra*, in such a distinct manner as to leave no doubt that it intended and was asserting a federal right. *Oxley Stave Company* v. *Butler County*, 166 U.S. 648. It will be noted from an examination of the record that appellant in its special appearance, plea of no jurisdiction and motion to quash (R. 12, 14), made no mention of the Oklahoma jurisdictional statutes, *supra*. The same is true with regard to appellant's motion for a new trial (R. 225, 226, 227). The only mention made by appellant in its petition in error to the Supreme Court of the State of Oklahoma was that it was error for the state court to assume jurisdiction over appellant.[5] And it will be further noted that therein appellant made no ref-

[5] Paragraphs 8 and 20, appellant's Petition in Error.

erence to the Oklahoma jurisdictional statutes, *supra*, did not identify the statutes now complained of, nor made any allegations at any point that the jurisdictional statutes, *supra*, had been unconstitutionally applied. When the validity of a state statute is drawn into question, it must be clearly identified. *Yazoo and N.V.R. Company* v. *Adams*, 180 U.S. 41.

If a state statute is not considered by the highest appellate court in a particular state in light of a federal question properly presented, the Supreme Court of the United States is without jurisdiction to review. *Beck* v. *Washington*, 369 U.S. 541.

In view of the failure of appellant to have raised a federal question in compliance with state rules of procedure, the questions now presented by appellant cannot be reviewed by the Supreme Court of the United States. *In re Lamkin*, 355 U.S. 59; *Ferguson* v. *Georgia*, 365 U.S. 570. If the state procedural rule which forbids the raising of a question at a late stage in the proceedings is reasonable, it is considered a valid exercise of state power. *Williams* v. *Georgia*, 349 U.S. 375. When appellant belatedly attempted to raise the constitutional question in his petition for rehearing before the Oklahoma Supreme Court, the court dismissed the petition without an opinion. The failure to render an opinion raises a presumption that the court considered the raising of the constitutional issue on a petition for rehearing as untimely under the rules of procedure. *Mutual Life Insurance Company* v. *McGrew*, 188 U.S. 291; *Bailey* v. *Anderson*, 326 U.S. 203.

Appellant's failure to assert a federal constitutional question in the trial court and the Oklahoma Supreme Court's refusal to consider the question on a petition for rehearing precludes review by the Supreme Court of the United States. *Stenbridge* v. *Georgia*, 343 U.S. 541; *Radio Station WOW* v. *Johnson*, 326 U.S. 120; *Hanson* v. *Denckla*, *supra*; *Herndon* v. *Georgia*, 295 U.S. 441; *American Security Company* v. *Baldwin*, 387 U.S. 156; *Forbes* v. *State Counsel*, 216 U.S. 396; *Simmerman* v. *Nebraska*, 116 U.S. 54.

Appellant contends[6] that the opinion of the Supreme Court of the State of Oklahoma was "novel, unprecedented, and wholly unanticipated" and then claims surprise and tries to bring itself within the rule promulgated in *State of Missouri ex rel. Missouri Insurance Commission* v. *Gehner*, 281 U.S. 313, which would allow a review by the Supreme Court of the United States if appellant could not have reasonably anticipated how the Oklahoma Supreme Court would rule with regard to appellant's federal rights.

Appellant, in alleging that it was surprised by the "unanticipated" opinion of the Oklahoma Supreme Court, has set out that this was the first time the Oklahoma Supreme Court had ever applied the Oklahoma jurisdictional statutes, *supra*, to subject an out-of-state publishing company to suit in Oklahoma for libel. This may be true. However, appellant or any other publisher has never been given immunity by the Oklahoma law from suit nor has a publishing company been placed in a category which is special

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[6] Appellant's Jurisdictional Statement, pp. 19, 20.

or separate and apart from all other industries. There are numerous prior Oklahoma decisions dealing with the question of foreign corporations "doing business" in Oklahoma, their respective types of business being many and varied.[7] For appellant to conclude that it should be treated differently by the Oklahoma Supreme Court than any other industry, and to present such an argument to this Court as a basis for "surprise" is an imposition upon the credulity of reasonable men.

Appellant could not plead ignorance of the cited cases,[8] and was therefore bound to anticipate the probability of a similar ruling in its own case. *Herndon* v. *Georgia, supra.*

Appellant asserts[9] that it properly raised the question of the constitutionality of the Oklahoma jurisdictional statutes, *supra*, by filing a motion to quash and a plea to the jurisdiction and cites as authority therefor *First State Bank of Tuskahoma* v. *J. B. Klein Iron and Foundry Company*, 180 Okla. 42, 68 P.2d 777; and *Southard* v. *Oil Equipment Corporation*, 296 P.2d 780. The cases cited are authority for the statement that a motion to quash and special plea to the jurisdiction is the proper way to attack jurisdiction; however, neither case is authority for the assertion

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[7] *Wills* v. *National Mineral Co.* (1936), 176 Okla. 193, 55 P.2d 499 (manufacturer of barber and beauty shop equipment and appliances); *Chain Belt Co.* v. *Oklahoma Tax Commission* (1941), 189 Okla. 248, 116 P.2d 899 (manufacturer of belts); *S. Howe Co.* v. *W. P. Milling Co.* (1954) 277 P.2d 655 (manufacturer of milling machinery); *Superior Distributing Corp.* v. *Hargrove* (1957), 312 P.2d 893 (manufacturer of pop corn machines); *Able* v. *Albina Engine & Machine Works* (C.C.A. 10th, 1960), 284 F.2d 510.

[8] See Footnote 7.

[9] Appellant's Jurisdictional Statement, p. 16.

that a motion to quash and a special plea to the jurisdiction is the proper way to raise a *constitutional* question, appellant's statement notwithstanding.[10]

Appellant then takes the position that its assertion that the constitutional question was properly raised by its motion to quash and special plea to the jurisdiction with the statement that the question *obviously was raised* inasmuch as the trial judge in his opinion cited *International Shoe Company* v. *Washington*, 326 U.S. 310 and *McGee* v. *International Life Insurance Company*, 355 U.S. 220 and other federal decisions involving due process and the validity of state statutes authorizing substitute service on non-resident defendants. This circuitous reasoning, of course, avoids the fact that each of the cited cases had to deal with whether or not a non-resident corporation was "doing business" within the state to determine whether or not the state's jurisdictional statute had been unconstitutionally applied, after the constitutional question had been timely and properly raised. Each of the cited cases also sets out some standard of conduct within the forum state for determining whether or not the non-resident corporation was engaging in sufficient activities within the state as to make it amenable to local service of process. Appel-

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[10] The *Tuskahoma* case, *supra*, deals with the question of whether or not service would be good against a defendant not a resident of the county wherein the court was sitting, where plaintiff had failed to plead a good joint cause of action against both the resident defendant and non-resident defendant. The *Southard* case, *supra*, deals with whether or not a personal judgment can be rendered against individual partners of a partnership without first having obtained judgment against the partnership as an entity.

lant further states[11] that it is beyond doubt that the Oklahoma Supreme Court has construed the term "doing business" in the jurisdictional statutes to be co-extensive and synonymous with the Fourteenth Amendment due process definition of that term as delineated in *International Shoe* case, *supra*, and other federal cases cited.

It is entirely possible that the state court, in arriving at its opinion, used the "doing business" standards which were given birth in *International Shoe* case, *supra*, and attained growth in subsequent federal and state decisions. However, this does not give rise to a presumption that such standards were applied by the court to determine whether or not the Oklahoma jurisdictional statutes were unconstitutionally applied under the United States constitutional guaranty of due process. *Even if appellant had properly raised a federal question, the Oklahoma Supreme Court would still have had to make a determination as to whether or not appellant was "doing business" in Oklahoma within the meaning of the Oklahoma jurisdictional statutes, supra,* and then would have had to further determine if the standards applied under Oklahoma law denied appellant a right under the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of the United States should not pass on a federal question discussed in an opinion of a state court where it appears that the judgment below rests on adequate state grounds. *Black v. Cutter Laboratories, supra.*

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[11] Appellant's Jurisdictional Statement, p. 18.

3. That the judgment rests on an adequate non-federal ground.

In as much as appellant failed to raise a federal question in the proceedings below, it must follow that the opinion of the Supreme Court of Oklahoma is based on a "non-federal" ground. The question which would arise in connection therewith is: Is the non-federal ground adequate to support the judgment of the state court? And if the non-federal ground is independent of any federal ground and adequate to support the judgment of the state court, then the Supreme Court of the United States lacks jurisdiction to review. *Fox Film Corp.* v. *Muller*, 296 U.S. 207.

The agreement between appellant and Mid-Continent News Company, one of its Oklahoma distributors (Pltf.'s Ex. 3, R. 273, 274, 275), is quite detailed and conclusive as to Mid-Continent's duties with regard to the sale and distribution of appellant's publications in Oklahoma. The agreement purports to be one between "independent contractors"; however, an examination of same quickly reveals that appellant, by the terms of the agreement, controls the details of how Mid-Continent is to distribute and sell appellant's publications.

In determining whether an agreement is one of agency or between independent contractors, the controlling and decisive test is: Does principal have the right to control the physical details of the work done by agent, or, does the latter represent the former only as to the result to be accomplished. *Yellow Cab Co.* v. *Wills*, 199 Okla. 272, 185 P.2d 689.

It will be noted that appellant pu' on no evidence in the trial of the case and therefore the evidence of appellee was uncontradicted. When evidence is undisputed, the question of whether the relationship of the parties is that of independent contractor and contractee, or employer and employee is one of law for determination by the court. *Fairmont Creamery Company* v. *Carsten*, 175 Okla. 592, 55 P.2d 757.

Although neither the trial court nor the Supreme Court of Oklahoma specifically hold Mid-Continent to be an agent of appellant, it is obvious that each court considered Mid-Continent as appellant's agent. The trial court held that the written agreement and the activities of appellant's agent, Mead, "creates a branch office of Fawcett (appellant) in Oklahoma." The Supreme Court of Oklahoma found, and held, from such evidence that "Mid-Continent was little more than a mere conduit through which Fawcett (appellant) exercised its own free and unhampered discretion."

The question of agency would be a question for the state court to resolve, and the finding that agency existed would be an adequate non-federal ground. *Curtis Publishing Company* v. *Cassel*, 301 F.2d 132 (C.C.A. 10th, 1962), *National Carbide Corp.* v. *Commissioner of Internal Revenue*, 336 U.S. 422.

C. CONCLUSION

For the reasons stated, appellee contends that appellants appeal should be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 57

FAWCETT PUBLICATIONS, INC., *Appellant*,

v.

DENNIT MORRIS, *Appellee*.

Appeal from the Supreme Court of Oklahoma

APPELLANT'S REPLY TO MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 741

FAWCETT PUBLICATIONS, INC., *Appellant*,

v.

DENNIT MORRIS, *Appellee*.

Appeal from the Supreme Court of Oklahoma

APPELLANT'S REPLY TO MOTION TO DISMISS

I. All of the Questions Presented By This Appeal Are Reviewable and Warrant Plenary Resolution by the Court

Appellee's Motion to Dismiss confines itself solely to the first question presented in the Jurisdictional Statement, allegedly because questions 2, 3, and 4 do not draw into question the federal constitutional validity of any Oklahoma statute and are thus "not proper questions to be considered on appeal under 28 U.S.C. 1257(2) . . . ." (Motion to Dismiss, p. 2.) This allegation is obviously in error with respect to question 2, which directly challenges

the application to appellant of the Oklahoma "long arm" statute, 18 Okla. Stat. §§ 1.17, 472, as being repugnant to the First Amendment guarantee of freedom of the press.

In any event, it is unnecessary at this stage to consider in depth whether any of the questions presented is technically proper for appeal under 28 U.S.C. § 1257(2). The Court is well aware that 28 U.S.C. § 2103 provides:

> "If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State . . . in a case where the proper mode of review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken . . . ."

Accordingly, if some or all of the questions presented in a jurisdictional statement are not technically proper for appeal but qualify for certiorari review, the Court automatically considers and acts upon such questions as if they were presented in a petition for writ of certiorari. *E.g.*, *Anonymous* v. *Baker*, 360 U.S. 287, 290 (1959); *Raley* v. *Ohio*, 360 U.S. 423, 435 (1959); *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547 (1922). And, as the Court expressly recognized in *Flournoy* v. *Wiener*, 321 U.S. 253, 263 (1944), an appellant may include in his jurisdictional statement, in addition to appealable questions, "any other denial of federal right whether or not capable in itself of being brought here by appeal." See Stern and Gressman, Supreme Court Practice § 3-6, at 73 (3rd ed., 1962).

By all relevant standards, the questions presented in this case clearly merit review and resolution by the Court. Indeed, the substantiality and importance of the due process and freedom of the press issues here at stake are directly attested by the Court's recent grant of certiorari in the closely similar case of *New York Times Co.* v. *Sullivan*, 144 So. 2d 25 (Ala. 1962), on January 7, 1963,

371 U.S. 946 (No. 606, this Term). The close identity of subject matter, issues, and constitutional principles involved distinctly warrants that this case be set for argument contemporaneously with *New York Times Co.* v. *Sullivan.*

II. Appellee's Argument Concerning Reviewability of the First Question Presented Is Without Substance

Appellee argues that the decision below—which would extend the reach of the State's "long arm" statute to acquire jurisdiction of a foreign publisher whose contacts with the forum have been held by federal courts of appeal and other state courts not to authorize "long arm" jurisdiction as a matter of Fourteenth Amendment due process—does not present a federal question. This argument is wholly insupportable.

As we have pointed out,[1] and as appellee does not dispute, prior decisions of the Oklahoma Supreme Court plainly established that the State's "long arm" statute was intended to reach as far as Fourteenth Amendment due process permits under this Court's precedents which have partially lowered the strict barrier against extra-territorial service of process erected by *Pennoyer* v. *Neff*, 95 U.S. 714 (1877). Since the statute had thus been construed to reach as far as possible without invading Fourteenth Amendment due process, it is clear that a non-resident defendant claiming to be *outside* the reach of the statute is unmistakably and self-evidently asserting that he is *inside* the protection of the Fourteenth Amendment. This objection was made by appellant in this case—as appellee acknowledges— "from the time summons was served."[2] The trial court explicitly understood and passed upon the jurisdictional issue as a federal due process

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[1] Jurisdictional Statement, pp. 17-19.

[2] Motion to Dismiss, p. 4.

question, as demonstrated by its express reliance upon this Court's decisions, including *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).[3] Both appellant and appellee argued the issue on the basis of these and other federal due process cases in the trial court and in the Supreme Court of Oklahoma,[4] which appellee does not deny. These cases unequivocally supplied reference to and reliance upon the Fourteenth Amendment.

In light of these incontestable facts, there is no basis whatever for the statement that a question of Fourteenth Amendment due process was not presented to the court below. The right to obtain review in this Court of federal constitutional deprivations rests on a much stronger footing than the quicksand of mere verbalism or talismanic form. As this Court stated in *Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928):

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."[5]

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[3] See Jurisdictional Statement, p. 17.

[4] See Jurisdictional Statement, p. 18, n. 9.

[5] To the same effect, see the cases cited in the Jurisdictional Statement, p. 19.

The standards thus described are ones of substance, not mere form, and they are squarely met in this case. They are but another way of saying that state courts cannot defeat review here of federal constitutional questions by disregarding them or concealing them behind specious non-federal grounds of decision.

Of no merit whatever is appellee's suggestion that the court below may actually have concluded, without saying so, that the independent wholesale distributor Mid-Continent News Company was an "agent" of appellant (rather than a "mere conduit"), and hence that the jurisdictional holding may rest on an "adequate non-federal ground."[6] The premise is wholly false, and the conclusion is a *non sequitur*.

The essential legal elements of an agency relationship between appellant and Mid-Continent are palpably lacking, and it would be absurd to pretend otherwise. This is precisely why the court below strained to find some other designation and finally drew out of thin air the label that Mid-Continent was "little more than a mere conduit" of appellant.[7] Whatever may have been meant by this novel coinage, it certainly cannot be put forward as a non-federal ground to support the decision.

The controlling issue is whether the nonresident defendant has had the "minimal contacts" with the forum state "that are a prerequisite to its exercise of power over him" under the due process clause of the Fourteenth Amendment. *Hanson* v. *Denckla*, 357 U.S. 235, 251 (1958); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945). This is inherently and solely a federal question, and a state court's labeling or verbal characterization of the nonresident's contacts with the forum can neither alter

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[6] Motion to Dismiss, p. 11.

[7] Jurisdictional Statement, p. 9a; R. 239.

the true nature of those contacts nor detract from this Court's power and duty to make its own independent analysis and determination of the constitutional effect.

The relationship between appellant and Mid-Continent entails no restraints or conditions beyond those which are commonly, if not universally, found between periodical publishers and independent wholesalers. This fact is readily apparent from the numerous decisions of other courts, cited and discussed in the Jurisdictional Statement,[8] which conflict with the decision below and hold that foreign publishers having the same or more contacts with the forum than does appellant are not amenable to suit there by substituted service. Appellee has not disputed this, and it is clearly indisputable. This conflict of decisions requires definitive resolution by the Court now.

Finally, it should be noted that appellee has not denied, as indeed he could not, that the decision of the court below on the merits constituted a complete and stunningly abrupt departure from prior Oklahoma libel law of long standing. The first question presented (and the others as well), having been explicitly presented in the petition for rehearing, were therefore unquestionably raised in due time and are properly here for review under this Court's settled practice.[9] Appellee's suggestion that the court below may possibly have refused to consider the question of the constitutionality of the statute because it was not raised in the trial court must be rejected. First, it is clear that the question *was* raised in the trial court, as we have already demonstrated. Second, even if this were not the case, it is not true that the Supreme Court of Oklahoma has a categorical rule against considering questions of constitutionality not raised in the trial court, and it is clear that

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[8] Pp. 24-27.

[9] See Jurisdictional Statement, pp. 20-23.

such questions will be considered when they go to jurisdiction or to matters of public interest, policy, or welfare.[10]

CONCLUSION

For the foregoing reasons, and for the reasons presented in the Jurisdictional Statement, it is submitted that this appeal presents substantial and far-reaching federal questions which urgently require resolution by the Court.

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[10] See, *e.g.*, *Simons* v. *Brashears Transfer & Storage Co.*, 344 P.2d 1107, 1108-09 (Okla., 1959); *First Nat'l Bank* v. *Southland Production Co.*, 189 Okla. 9, 112 P.2d 1087, 1098 (1941); *Shaffer Oil & Ref. Co.* v. *County Treasurer*, 175 Okla. 6, 52 P.2d 76 (1935); *Magnolia Petroleum Co.* v. *State*, 175 Okla. 11, 52 P.2d 81 (1935).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 57

FAWCETT PUBLICATIONS, INC.,
Appellant,

vs.

DENNIT MORRIS,
Appellee.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 57

FAWCETT PUBLICATIONS, INC.,

Appellant,

vs.

DENNIT MORRIS,

Appellee.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

PETITION FOR REHEARING.

Although we are most reluctant to ask rehearing on the grounds we urge here, we are impelled to do so in the interests of justice and because of our obligation to both client and court.

The judgment of the Supreme Court of Oklahoma we seek to be reviewed was a five-to-four decision, with the majority sustaining the $75,000 judgment rendered below. As demonstrated in our jurisdictional statement (pp. 15-21), the majority's opinion squarely conflicts with all previously declared and long-established Oklahoma libel precedents. We first appeared in this case after all the proceedings in Oklahoma had been concluded, and we were

immediately struck by the Oklahoma Supreme Court's manifest departure from all of its prior decisions.

On April 8, 1964, one of the members of the Oklahoma Supreme Court who was in the majority below was indicted on five counts of federal income tax evasion; a copy of that indictment is appended to this petition. The terms of the indictment, combined with the fact that a former Justice of the same court was contemporaneously indicted for the same kind of violation, suggests a substantial implication of judicial misconduct.[1] Thus, the instant $75,000 judgment[2] is now under serious cloud, and should not, we submit, be permitted to become final and enforceable; a grave injustice could result unless this Court acts to prevent finality from occurring.[3]

We believe justice now requires that at very minimum the instant case be held by this Court until the situation in Oklahoma is further clarified. Only then can the Court determine what further action or proceedings are appropriate in light of those later events.

Or, we urge in the alternative, the Court may well now

1. The related indictment is No. 64-85 in the U. S. District Court for the Western District of Oklahoma and is against N. S. Corn, aka Nelson S. Corn.

2. With accumulated interest the amount is now in excess of $92,000.

3. There are twelve other libel suits now awaiting trial in the Federal District Court in Oklahoma arising from the same publication. (See jurisdictional statement, p. 4, n. 1. See also *Dodd* v. *Fawcett Publications, Inc.*, U. S. Court of Appeals for the 10th Circuit, No. 7418, ... F. 2d ..... decided March 10, 1964.) The 12 suits were held pending this Court's decision in the instant case. The plaintiffs in those 12 suits were teammates of the plaintiff Morris here. The now suspect Oklahoma Supreme Court decision here, if allowed to stand, will undoubtedly be strongly urged as a precedent against Fawcett in the twelve cases.

be persuaded that the very filing of the indictment itself is sufficient predicate for fully hearing the case on the merits. We do not think jurisdiction to review the judgment below is lacking; two members of this Court have expressly indicated the same belief by their dissents to the dismissal. Indeed, we cannot believe that the Court would have held our jurisdictional statement more than a year pending decision in *New York Times Co. v. Sullivan* (No. 39, this Term), all the while allowing interest on $75,000 at 6% to accumulate, if jurisdiction were so patently lacking as to warrant summary dismissal.

With revelation of the indictment appended hereto, we respectfully submit the Court should now either grant this petition for rehearing and accord plenary review of the judgment, or at the very least, suspend action in this case pending subsequent developments in Oklahoma.

Respectfully submitted,

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Attorneys for Appellant.

CERTIFICATE OF COUNSEL.

I, Don H. Reuben, counsel of record for Appellant Fawcett Publications, hereby certify that the above and foregoing Petition For Rehearing is presented in good faith and not for delay.

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APPENDIX "A."

IN THE UNITED STATES DISTRICT COURT
for the Western District of Oklahoma.

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* EARL WELCH, *Defendant*.	No. 64-86 Criminal (26 United States Code Section 7201).

INDICTMENT.

THE GRAND JURY CHARGES:

COUNT I.

That on or about the 15th day of April, 1958 in the Western District of Oklahoma, Earl Welch, late of Oklahoma City, Oklahoma, who during the calendar year 1957 was married, did wilfully and knowingly, attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1957, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Oklahoma City, at Oklahoma City, Oklahoma, a false and fraudulent joint income tax return on behalf of himself and his wife, wherein it was stated that their taxable income for said calendar year was the sum of $7,121.57 and that the amount of tax due and owing

thereon was the sum of $1,441.13, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $15,465.28 upon which said taxable income there was due and owing to the United States of America an income tax of $3,712.96.

In violation of Section 7201, Internal Revenue Code; 26 U. S. C., Section 7201.

COUNT II.

That on or about the 10th day of April 1959, in the Western District of Oklahoma, Earl Welch, late of Oklahoma City, Oklahoma, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1958, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Oklahoma City, at Oklahoma City, Oklahoma, a false and fraudulent income tax return, wherein he stated that his taxable income for said calendar year was the sum of $8,582.03 and that the amount of tax due and owing thereon was the sum of $1,942.40, whereas, as he then and there well knew, his taxable income for said calendar year was the sum of $17,926.02 upon which said taxable income there was owing to the United States of America an income tax of $6,110.80.

In violation of Section 7201, Internal Revenue Code; 26 U. S. C., Section 7201.

COUNT III.

That on or about the first day of April, 1960, in the Western District of Oklahoma, Earl Welch, late of Oklahoma City, Oklahoma, who during the calendar year 1959 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by

him and his wife to the United States of America for the calendar year 1959, by filing and causing to be filed with the District Director of Internal Revenue of Oklahoma City, at Oklahoma City, Oklahoma, a false and fraudulent joint income tax return on behalf of himself and his wife, wherein it was stated that their taxable income for said calendar year was the sum of $5,174.89 and that the amount of tax due and owing thereon was the sum of $1,004.33, whereas, as he then and there well knew, their joint taxable income for said calendar year was the sum of $9,424.77, upon which said taxable income there was owing to the United States of America an income tax of $1,996.29.

In violation of Section 7201, Internal Revenue Code; 26 U. S. C., Section 7201.

COUNT IV.

That on or about the 24th day of March, 1961, in the Western District of Oklahoma, Earl Welch, late of Oklahoma City, Oklahoma, who during the calendar year 1960 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1960, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Oklahoma City, at Oklahoma City, Oklahoma, a false and fraudulent joint income tax return on behalf of himself and his wife, wherein it was stated that their taxable income for said calendar year was the sum of $4,639.38 and that the amount of the tax due and owing thereon was the sum of $867.39, whereas, as he then and there well knew, their joint taxable income for the said calendar year was the sum of $14,257.61 upon which said taxable income there was owing to the United States of America an income tax of $3,345.88.

In violation of Section 7201, Internal Revenue Code; 26 U. S. C. Section 7201.

COUNT V.

That on or about the 2nd day of April 1962, in the Western District of Oklahoma, Earl Welch, late of Oklahoma City, Oklahoma, who during the calendar year 1961 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1961, by filing and causing to be filed with the District Director of Internal Revenue, for the Internal Revenue District of Oklahoma City, at Oklahoma City, Oklahoma, a false and fraudulent joint income tax return on behalf of himself and his wife, wherein it was stated that their income on which they computed their income tax for the calendar year was the sum of $8,280.72 and that the amount of tax due and owing thereon was the sum of $1,742.99, before applying a dividend credit of $50.99, whereas, as he then and there well knew, their joint income on which their income tax was to be computed for the said calendar year was the sum of $19,753.08 upon which said income there was owing to the United States of America an income tax of $5,196.05.

In violation of Section 7201, Internal Revenue Code; 26 U. S. C. Section 7201.

A TRUE BILL:

/s/ (SIGNATURE)
Foreman.

/s/ (SIGNATURE)
United States Attorney.